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Transcendental Meditation and the Meaning of Religion under the Establishment Clause

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Note: Transcendental Meditation and the Meaning of Religion Under the Establishment Clause*

Transcendental Meditation (TM) is an effective relaxation technique that involves "thinking" a special sound, or "mantra."[1] Introduced into the United States less than twenty years ago, TM has achieved a remarkable degree of popularity and scientific approval. As a consequence, both TM and its underlying theory, the Science of Creative Intelligence (SCI),[2] have gained substantial support from private institutions and governmental agencies. Despite this widespread acceptance, governmental sponsorship of TM programs has drawn severe criticism from those who have labeled TM religious on the basis of its resemblance to various Hindu practices.[3] At least two lawsuits have claimed that government support of SCI/TM violates the constitutional prohibition of religious establishment.[4]

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1. TM is practiced twice daily, fifteen to twenty minutes at a time, and is said to enable the nervous system to achieve a deep state of wakeful rest. The mantra is a Sanskrit word selected for the meditator by his teacher on the basis of a perceived relationship between its sound and the meditator's personality. For further discussion of mantras and TM generally, see notes 83-106 & 121-22 *infra* and accompanying text.

"Transcendental Meditation" and its acronym "TM" do not refer to mantric meditation generally but rather to a specific practice introduced to the West by Maharishi Mahesh Yogi, an Indian guru. *See* note 95 *infra* and accompanying text. Both terms are service marks of the World Plan Executive Council, the chief TM organization. *See also* note 146 *infra.*

2. The term "Science of Creative Intelligence" reportedly originated in 1969 with Jack Forem, who was teaching a college course on the principles of TM and wanted an academic-sounding title for it. *See* J. FOREM, TRANCENDENTAL MEDITATION 216 (1973). Both "Science of Creative Intelligence" and its acronym "SCI" are service marks of the World Plan Executive Council.

3. *See* J. BJORNSTAD, THE TRANSCENDENTAL MIRAGE (1976); K. BOA, CULTS, WORLD RELIGIONS, AND YOU 156-66 (1977); J. HEFLEY, THE YOUTHNAPPERS 59-76 (1977); G. LEWIS, WHAT EVERYBODY SHOULD KNOW ABOUT TRANSCENDENTAL MEDITATION (1974); L. MCBETH, STRANGE NEW RELIGIONS 110-24 (1977); C. MILLER, TRANSCENDENTAL HESITATION (1977); J. PATTON, THE CASE AGAINST TM IN THE SCHOOLS (1976); J. WELDON & Z. LEVITT, THE TRANSCENDENTAL EXPLOSION (1976); Fulton, *Public Funding for TM?*, 92 CHRISTIAN CENTURY 1124 (1975). Although much of the opposition to state promotion of TM has come from fundamentalist Christian or Jewish groups, opposition has come from nonsectarian sources as well. *See, e.g., Transcendental Meditation Barred from Public Schools*, 30 CHURCH & ST. 243 (1977).

4. The Constitution forbids any "law respecting an establishment of religion." U.S. CONST. amend. I. In 1976, a coalition of taxpayers, parents, and clergymen brought suit to enjoin five New Jersey high schools from offering elective courses in SCI and TM. *See* text accompanying notes 5-13 *infra.* A similar suit challenging the teaching of TM was reportedly brought in California in 1975. *See* Fulton, *supra* note

In the first case to rule on this question, *Malnak v. Mahesh*,[5] a federal district court considered the validity of a New Jersey public high school program that offered an elective course entitled "The Science of Creative Intelligence."[6] The classroom instructors were neither certified nor paid by the schools, but were official TM teachers brought in especially to teach the course.[7] Much of the course involved discussion of a textbook teaching that Transcendental Meditation brings the meditator into direct contact with the "field of pure creative intelligence."[8] This contact, according to the textbook, "clarifies and strengthens the meditator's thoughts," " 'refines' [his] nervous system," and "infuses [his] mind both with creativity . . . and with 'all the qualities of creative intelligence,' " including "truth," "happiness," and "fulfillment."[9] Once concepts such as these had been introduced, classroom discussion was combined with the daily practice of TM. In order to learnTM, each student had to attend an initiation ceremony, or "puja," which was held on a weekend and off the school premises. At the puja, the student's instructor sang a Sanskrit chant and gave the student his mantra and his initial instruction in TM.[10] The chant invoked the names of Hindu gods and of historical figures thought to be past masters of meditation.[11] Although the instructors were given an English translation of the chant, there was no indication that a translation was given to the students.[12] On these facts, the court granted plaintiffs' motion for summary judgment and held that the course violated the establishment clause of the first amendment.[13]

The facts in *Malnak* required a shift away from the traditional focus of establishment clause analysis. In prior cases, the religious

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3, at 1124. Also, the Attorney General of Iowa was formally requested to proceed against TM organizations on the ground that they were violating consumer fraud laws by peddling religion under a secular label. *See id.*

5. 440 F. Supp. 1284 (D.N.J. 1977), *appeal docketed,* Nos. 78-1568, 78-1569 (3d Cir. May 11, 1978).

6. *Id.* at 1289.

7. *Id.* Although the teachers were paid by the TM organizations and not the schools, the programs did receive approximately $40,000 in federal aid. *See Transcendental Meditation Barred from Public Schools, supra* note 3, at 243. The Department of Health, Education, and Welfare, which authorized the aid, was named as a defendant.

8. 440 F. Supp. at 1289.

9. *Id.* at 1289-90 (quoting the textbook).

10. *Id.* at 1305.

11. *See id.* at 1306-07.

12. *See id.* at 1306.

13. *See id.* at 1327. The court appeared to rest its holding on the finding that the SCI/TM courses had a religious purpose, although it also indicated that the courses were unconstitutional because of impermissible religious effect and excessive religious entanglement.

nature of the challenged activities was clear,[14] and the question of legality therefore turned on the meaning of "establishment" rather than the meaning of "religion." In *Malnak,* however, the issue was whether a doctrine and practice that were not obviously religious and that were asserted by proponents to be wholly secular should nevertheless be characterized as religious for the purposes of the establishment clause.

The court, although recognizing the "novel aspects" of the case, declined "to improvise an unprecedented definition of religion under the first amendment."[15] Rather, it looked to the "substantive characteristics"[16] of theories or practices deemed to be religious under prior interpretations of the establishment clause and then drew analogies between those characteristics and certain attributes of SCI/TM. Specifically, the court likened TM's puja to a form of prayer and SCI's concept of Creative Intelligence to the traditional concept of God.[17] Since it apparently was not disputed that the public schools were promoting SCI/TM, these analogies compelled the conclusion that teaching SCI/TM in the public schools was an establishment of religion.[18]

In reaching its conclusion, the court offered several guidelines for establishment clause analysis. First, it suggested that any workable test for religion under the first amendment must focus on the substantive content of the belief or activity in question.[19] The court rejected defendants' argument that the controlling factor should be the actual perceptions of those who adhere to the belief or participate in the activity. The court reasoned that injecting such subjective characterizations into the evaluation of beliefs and activities would "preclude a fair and uniform standard."[20] Second, the court noted

14. *See* note 34 *infra.*

15. 440 F. Supp. at 1320. In declaring such a definition "unprecedented," the court was probably alluding to its earlier comment that "courts have avoided the establishment of explicit criteria . . . identif[ying] an activity as religious for purposes of the first amendment." *Id.* at 1312. Whatever the court may have meant by such a statement, attempts to explicate the legal meaning of religion have been numerous. For some judicial efforts, see cases cited in L. TRIBE, AMERICAN CONSTITUTIONAL LAW 826-28 (1978); cases cited notes 46-48 *infra.* For some of the more noteworthy scholarly efforts, see Dodge, *The Free Exercise of Religion: A Sociological Approach,* 67 MICH. L. REV. 679 (1969); Fernandez, *The Free Exercise of Religion,* 36 S. CAL. L. REV. 546, 561 (1963); Note, *Toward a Constitutional Definition of Religion,* 91 HARV. L. REV. 1056 (1978).

16. 440 F. Supp. at 1315.

17. *See id.* at 1320-23.

18. *See id.* at 1323.

19. *See id.* at 1315-17, 1321.

20. *Id.* at 1318. On the motion for summary judgment, defendants emphasized that, whereas programs previously disapproved were clearly religious in nature, a program in SCI/TM is not. *See id.* at 1315. The court considered this distinction at

that prior establishment cases had invalidated programs that had involved simply an invocation of "God," and therefore rejected the defendants' assertion that certain institutional attributes such as clergy, places of worship, and symbols are essential to religion.[21] Finally, the court indicated that "religion" under the establishment clause, while revolving around the concept of a supreme being, is an expansive concept that may encompass beliefs or activities ordinarily considered nonreligious. For example, the court asserted that certain moral values typically advanced by the government to promote secular societal goals might become religious if the government promoted them as "divine law."[22] According to the court, even atheism could be a religion under the establishment clause if it dogmatically denied the existence of a supreme being.[23]

In formulating these guidelines, the *Malnak* court seems to have relied on its understanding of general establishment clause precedent, its appreciation of the pragmatic difficulties of applying a uniform establishment clause standard, and its intuitive notion of what constitutes religion. Absent from its analysis, however, was any explicit examination of the values underlying the establishment clause or a coherent conceptual framework, rooted in those values, that would explain why the elements it emphasized help to distinguish religious from nonreligious belief-systems, why dissimilarities between SCI/TM and traditional religions were deemed irrelevant, or whether other elements might be relevant in other contexts.

The court also left unclear the implications of its holding for other programs that involve TM. The court seemed to strike down the SCI/TM program on the basis of its express connection with the concept of a god-like Creative Intelligence and because of the ritual or prayer-like nature of TM's initiation ceremony, the puja.[24] TM, however, may be taught without reference to SCI, as the court itself apparently recognized.[25] Moreover, the court's analogy between TM's puja and the more traditional religious exercises that have been held to be impermissible in the public schools is not entirely persuasive. The cases cited to support this analogy involved programs consisting of recognizably religious ceremonies that subtly compelled *every* student to participate by requiring those students who objected to leave

length, *see id.* at 1315-20, concluding that "[w]hile the characterization of proponents is properly admissible evidence, proponents cannot propagate concepts which society recognizes as religious in nature merely because the proponents view the concepts as secular." *Id.* at 1320.

21. *See id.* at 1326.
22. *Id.* at 1316 n.20.
23. *See id.* at 1326 n.29.
24. *See id.* at 1322-23.
25. *See id.* at 1324 n.26.

the class.[26] In the TM program, by contrast, only those students electing to take the TM course were required to attend the puja. Although the court emphasized the fact that each student so electing was "compelled" to attend the "religious" puja,[27] there was apparently no compulsion to take the course in the first place, and, moreover, the court did not explain how a student's attendance at a single ceremony, conducted during nonschool hours, off school grounds, and where the student was primarily an observer,[28] contributed to an establishment of religion. It is at least open to question, then, whether the reasoning in *Malnak* compels the conclusion that any state support of TM is unconstitutional. The analysis would be even less compelling were TM organizations to dispense with the requirement that every initiate attend the puja.

This Note suggests one approach toward an establishment clause analysis of SCI/TM as well as other activities and belief-systems that are said to be nonreligious. The first section develops several objective criteria, based on the values underlying the establishment clause, that help determine whether a given belief-system or practice should be characterized as religious for purposes of the establishment clause. Applying these criteria, the second section concludes that SCI is a religion for establishment clause purposes and that TM is potentially a religious practice. The third section of the Note reviews the three tests—religious purpose, primary religious effect, and excessive government entanglement with religion—that courts have used to strike down state programs as establishments of religion and advocates adoption of a fourth: a least religious means test, which would forbid state use of religious means to achieve secular ends, both when alternative secular means are reasonably available and when the superior effectiveness of religious means is attributable to their religious nature. The final section of the Note applies these tests to several

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26. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (involving a daily prayer program); *cf.* School Dist. v. Schempp, 374 U.S. 203 (1963) (involving a daily Bible-reading program). Although attendance may be voluntary in that students can absent themselves, "non-conformity is not an outstanding characteristic of children." Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J., separate opinion). Furthermore, students are arguably subject to a subtle coercion:

> [B]y requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the [excusal] procedure may well deter those children who do not wish to participate . . . .
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> Such reluctance to seek exemption seems all the more likely in view of the fact that children are disinclined at this age to step out of line or to flout "peer-group norms."

School Dist. v. Schempp, 374 U.S. 203, 289-90 (1963) (Brennan, J., concurring).

27. 440 F. Supp. at 1305.

28. The court accepted as true the defendants' contention that the students took no active part in the ceremony. *See id.* at 1308-09.

possible programs of instruction in SCI/TM to determine the extent to which such instruction is constitutionally permissible.[29]

I. A TEST FOR RELIGION UNDER THE ESTABLISHMENT CLAUSE

The first amendment permits no governmental action "respecting an establishment of religion, or prohibiting the free exercise thereof."[30] Litigation arising under this language involves two conceptually distinct issues. The first is whether beliefs or activities inhibited or encouraged by the government are religious in nature.[31] The

29. The scope of this Note is limited to TM programs in primary and secondary public schools. Its analysis, however, has implications for public funding of TM programs in other areas. At least seventeen TM research projects have received governmental aid totaling more than $300,000. *See The TM Craze: Forty Minutes to Bliss,* TIME, October 13, 1975, at 71, 74; *Transcendental Meditation Barred from Public Schools, supra* note 3, at 247. TM has been used in government-sponsored rehabilitation programs for crime, alcoholism, and drug dependency. *See* Cox, *Transcendental Meditation and the Criminal Justice System,* 60 KY. L.J. 411 (1972); LaMore, *The Secular Selling of Religion,* 92 CHRISTIAN CENTURY 1133, 1134 (1975) (use of TM in United States Army programs). Indications are that such use is likely to increase. *See, e.g.*, Berkeley Independent and Gazette, Nov. 8, 1976, at 8, col. 3 (Pennsylvania Council on Drug and Alcohol Abuse considering use of TM); San Francisco Examiner, July 19, 1977, at 1 (California state parole board recommends $42,500 grant to teach TM in prisons); Memorandum from Dan C. Doyle, Chief Counsel of California Dep't of the Youth Authority, to Richard Isbell (Oct. 4, 1977) (on file at MINNESOTA LAW REVIEW) (recommending that California Parole Services Branch proceed with TM program if such a program seems useful). *See generally* Fulton, *supra* note 3.

While all public TM programs may pose constitutional problems, the problems are particularly acute in the public precollege school. As Professor Choper has observed, "children of elementary and high school age are far less mature and intellectually developed than the public generally, . . . particularly unable to evaluate conflicting religious beliefs objectively, . . . especially susceptible to being influenced in choice, and . . . compelled by law to attend . . . ." Choper, *Religion in the Public Schools: A Proposed Constitutional Standard,* 47 MINN. L. REV. 329, 337-38 (1963).

30. U.S. CONST. amend. I. Although the prohibition on governmental interference with religion literally applies only to a "law" of "Congress," the Supreme Court has held that the prohibition also applies, through the fourteenth amendment, to the laws of the states and to the actions of their agencies. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962)(establishment clause applies to actions of public school board); Everson v. Board of Educ., 330 U.S. 1 (1947)(establishment clause applies to state statute).

31. "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970). *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972)(state may defeat claim that a mandatory school attendance requirement "interferes with the practice of a legitimate religious belief" if it appears "that the State does not deny the free exercise of religious belief by its requirement").

This issue is itself really twofold: whether the government has actually interfered

second is whether the government has unduly inhibited those beliefs or activities (thereby violating the free exercise clause)[32] or unduly advanced them (thereby violating the establishment clause). It is the second inquiry—the degree to which government may advance religion—that has dominated the establishment clause cases.[33] This inquiry, both generally and with respect to SCI/TM, is the focus of sections three and four of this Note; the present section is an attempt to articulate a method of dealing with the threshold question: what is religion for the purposes of the establishment clause?[34]

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with or promoted a given belief or practice, and whether such belief or practice is religious in nature. For purposes of the analysis in this section of the Note, the existence of some degree of interference or promotion will be presumed.

32. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972)(state may defeat free exercise claim even where burden on free exercise is shown if "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause").

33. *See* cases cited note 34 *infra.*

34. For the purposes of this inquiry, the establishment clause cases themselves provide little concrete guidance. The unquestioned religious significance of the activities challenged in these cases has made an analysis of the meaning of religion for establishment clause purposes unnecessary. For instance, the Court has not found it necessary to articulate a test for religion in order to invalidate, as religious establishments, programs that require notaries public to swear to a belief in "God," *see* Torcaso v. Watkins, 367 U.S. 488 (1961); allow public school children "released time" to study Judaism and Christianity, *see* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948); require recitation of prayers in the public schools, *see* Engel v. Vitale, 370 U.S. 421 (1962); require daily Bible reading in the public schools, *see* School Dist. v. Schempp, 374 U.S. 203 (1963); prohibit the teaching of evolutionary theory in the public schools on the ground that it conflicts with creationist theory, *see* Epperson v. Arkansas, 393 U.S. 97 (1968); and give tax monies to various types of Christian schools, *see, e.g.,* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971).

Similarly, when upholding state activity against challenge, the Court has done so on the ground that the activity did not constitute an establishment rather than that the activity had no connection with religion. *See, e.g.,* Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Everson v. Board of Educ., 330 U.S. 1 (1947).

Only in School Dist. v. Schempp, 374 U.S. 203 (1963), did the Court even approach the issue whether the challenged practice was religious, summarily dismissing the school board's argument that its Bible-reading program was essentially secular with the simple assertion that "the place of the Bible as an instrument of religion cannot be gainsaid." *Id.* at 224.

The primary concern of the state and lower federal courts has similarly been whether the state activity constitutes an establishment rather than whether the doctrine involved is religious. *See, e.g.,* DeSpain v. DeKalb County Community School Dist. 428, 384 F.2d 836 (7th Cir. 1967), *cert. denied,* 390 U.S. 906 (1968); State Bd. of Educ. v. Board of Educ., 108 N.J. Super. 564, 262 A.2d 21 (Ch. Div.), *aff'd per curiam,*

Like any other term in a constitution or statute, "religion" must be construed in light of the provision in which it appears.[35] The task of describing religion for purposes of the establishment clause, then, is the task of identifying those beliefs or belief-systems that cannot be promoted by the government without undermining the values that the establishment clause is intended to protect. The criteria of an establishment clause religion should stem from and reflect those values; the criteria will be useful only to the extent that they distinguish those systems that can be promoted by the government without endangering establishment clause values from those that cannot.

Underlying the establishment clause are three basic values. First, there is the value of protecting the integrity of pre-existing religious belief from governmental interference.[36] This value is central to the free exercise clause, but it is also relevant to the establishment clause.[37] Second, there is the complementary value of protecting the

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57 N.J. 171, 270 A.2d 412 (1970), *cert. denied*, 401 U.S. 1013 (1971). A few cases, however, have upheld state programs on the ground that the doctrine involved was not religious. *See* Wright v. Houston Independent School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972) (biological evolution), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974); Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969) (sex education), *aff'd per curiam*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970); Sheldon v. Fannin, 221 F. Supp. 766, 774 (D. Ariz.) (singing of national anthem), *appeal dismissed*, 372 U.S. 228 (1963).

Until recently, even scholarly attempts to deal with the problem have been sparse and tentative. A consideration of the meaning of religion under the establishment clause has generally occurred when a commentator has argued for a broad definition of religion under the free exercise clause in order to afford the fullest protection for individual conscience and has then had to discuss whether such a broad definition would not cripple the state in its effort to promote important societal values. Such a consideration has nearly always resulted in a "two-definition" approach that defines religion broadly for purposes of the free exercise clause and narrowly for purposes of the establishment clause. *See* note 67 *infra*. Recently, fuller consideration of what ought to be considered a religion for purposes of the establishment clause has been offered. *See* Note, *supra* note 15.

35. The problems with a general definition, unguided by a specific purpose, are obvious. One author has declared that "it is difficult if not impossible to arrive at an adequate and acceptable definition of such a term as 'religion.' Every attempted definition carries with it the bias of the definer." L. PFEFFER, CHURCH, STATE, AND FREEDOM 607 (rev. ed. 1967). As if to prove the point, a psychologist, disclaiming any attempt to provide an exhaustive list, once compiled 48 scholarly definitions of religion. *See* J. LEUBA, A PSYCHOLOGICAL STUDY OF RELIGION 339-61 (1912).

36. *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The fullest realization of religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief."); Engel v. Vitale, 370 U.S. 421, 431 (1962) ("When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

37. *See* Note, *Toward a Uniform Valuation of the Religion Guarantees*, 80 YALE

integrity of individual religious choice from governmental influence. This value is intimately related to the first, but it is distinct inasmuch as the first protects the integrity of religious choice already made, whereas the second protects the freedom to adopt, modify, or reject a particular belief. It will be argued that this latter value—freedom of choice—is the central value underlying the establishment clause,[38] while the former—freedom of conscience—is the value essential to free exercise. The third value underlying the establishment clause is avoidance of religiously motivated political strife.[39] Whereas freedom of conscience and freedom of choice may be ascribed principally to one or the other clause, this third value underlies both clauses equally. Whenever the government becomes involved with a religious belief-system—whether by discouraging it and thereby interfering with freedom of conscience or by encouraging it and thereby interfering with freedom of choice—there inheres in that involvement a danger of political strife along religious lines.

All three of these values have been commonly and properly identified as relevant to the establishment clause.[40] Yet it is the conten-

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L.J. 77, 87-89 (1970).

38. *See* Zorach v. Clauson, 343 U.S. 306, 320 (1952) (Black, J., dissenting) ("State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of soft euphemism of 'cooperation,' to steal into the sacred area of religious choice."); Schwarz, *No Imposition of Religion: The Establishment Clause Value,* 77 YALE L.J. 692, 720 (1968)("[T]he ultimate fear is that government aid will directly or indirectly be used to influence choice of religion . . . . And it is this fear which causes strife and which makes use of the nonbeliever's or other-believer's taxes so galling."); Note, *supra* note 37.

39. Apprehension of religious strife is cited routinely in the establishment clause cases. *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602, 622 (1971)("Ordinary political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."); Walz v. Tax Comm'n, 397 U.S. 664, 694 (1970)(Harlan, J., concurring) (objective of the establishment clause is "preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point"); Everson v. Board of Educ., 330 U.S. 1, 26-27 (1947)(Jackson, J., dissenting):

> [The first amendment] was intended not only to keep the state's hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse.

40. *See, e.g.,* Freund, *Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680, 1684 (1969) (policy grounds underlying establishment clause include government neutrality, voluntarism, and nonentanglement of church and state); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle,* 81 HARV. L. REV. 513, 517-18 (1968)(scope of the establishment clause is suggested by the twin values of "voluntarism" and "political noninvolvement").

An additional value thought to be served by the establishment clause was the

tion of this Note that while forbidding the government from involving itself with religious beliefs and belief-systems promotes all three of these values, only freedom of choice is essential to the establishment clause.[41] Freedom of conscience and avoidance of religiously motivated political strife are derivative. That is, governmental programs promoting one belief are tolerable to the extent that they do not pose an unacceptable danger of influencing initial religious choice, despite the fact that such programs may indirectly threaten either to undermine pre-existing religious beliefs or to engender religious strife.[42]

If, then, the primary goal of the establishment clause is to protect freedom of choice—to bar the government from doing that which has the potential for inducing religious belief—the appropriate method for determining whether a given belief-system is religious for establishment clause purposes is to inquire whether governmental promotion of that belief-system will create an unacceptable danger of inducing religious belief. This formulation, of course, is not particularly helpful as it stands, for it subsumes within it two unknowns: what is religious belief, and what extrinsically observable factors create an "unacceptable danger" that such belief will be induced.

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prevention of interference by the national government with the choice of the states with respect to establishing religion. Although it has been argued that the due process clause of the fourteenth amendment was not meant to and should not incorporate the establishment clause, *see* E. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 111-16 (1951); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371, the Supreme Court has rejected this contention, *see* note 30 *supra*, without expressly considering it. For a brief discussion of the issue, see School Dist. v. Schempp, 374 U.S. 203, 256-58 (1963)(Brennan, J., concurring).

41. *See* Schwarz, *supra* note 38, at 710-15; *cf.* Zorach v. Clauson, 343 U.S. 306, 313 (1952)("We sponsor an attitude on the part of government . . . that lets each [religion] flourish according to the zeal of its adherents and the appeal of its dogma."). *See generally* Note, *supra* note 37, at 92-101.

42. The primacy of free choice as an establishment clause value suggests that the state may involve itself with religious beliefs, regardless of the religious reaction this may trigger, as long as that involvement does not unduly influence free religious choice. Thus, although protecting religious conscience and avoiding political strife along religious lines are routinely cited as important establishment clause values, *see* sources cited notes 36-37 & 39-40 *supra*, such values are relevant to the establishment clause only when a state program is also capable of inducing religious belief. A governmental program that actually undermines or runs contrary to the tenets of a particular religion does not of itself create an establishment clause problem, *see, e.g.*, Wright v. Houston Independent School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972) (instruction in biological evolution not a religious establishment even though it was contrary to certain religious beliefs), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974); Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969) (sex education not an establishment of religion despite the fact that it was opposed by various groups on religious grounds), *aff'd per curiam*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970), although it may provide the basis for a free exercise claim, *see, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Jehovah's Witness excused from flag salute program).

Legal conceptions of religious belief have been developed by courts in interpreting the free exercise clause and its statutory analogs.[43] As noted, the free exercise and establishment clauses differ in their emphases—one forbids governmental inhibition of existing religious belief while the other forbids inculcation. Nevertheless, both clauses obviously involve religious belief, and that concept is the same regardless of whether the governmental action is alleged to impermissibly inhibit or encourage it.

In a number of free exercise cases, the belief-system at issue was obviously and concededly a religion.[44] In such cases courts have been able to move directly to the question whether the burden imposed by the government on the practice of that belief was permissible. In other free exercise cases, however, litigants have claimed that a state program or law interfered with practices that the individual characterized as religious but that were identified with no conventional religion.[45] In these cases, courts have had to confront the issue whether the belief allegedly infringed was a religious belief.

Explicitly or implicitly, these courts have adopted the standard that a belief or belief-system is religious if it plays a role in the lives of its adherents analogous to the role played by conventional religions in the lives of their adherents.[46] Although essentially subjective, this

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43. *See, e.g.*, Universal Military and Service Act § 6(j), 50 U.S.C. app. § 456(j)(1970).

44. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972)(Amish); Sherbert v. Verner, 374 U.S. 398 (1963)(Seventh-day Adventist); Braunfeld v. Brown, 366 U.S. 599 (1961)(Orthodox Jew).

45. *See, e.g.*, Welsh v. United States, 398 U.S. 333 (1970)(plurality opinion); United States v. Seeger, 380 U.S. 163 (1965); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969); Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973), *aff'd per curiam*, 494 F.2d 1277 (8th Cir.), *cert. denied*, 419 U.S. 1012 (1974); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

46. Courts have adopted this or similar tests in a variety of contexts. *See* Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir.)(Scientologists' claims with respect to "E-meter" held entitled to first amendment protection, and truth-in-labeling requirements held not to apply; doctrine of Scientology likened to that of traditional religions in that it gave a comprehensive explanation of man's nature and his place in the universe), *cert. denied*, 396 U.S. 963 (1969); Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973)(Church of New Song allowed to claim protection of first amendment and thus to hold worship services in prison; doctrine of Church likened to that of the Hindu faith), *aff'd per curiam*, 494 F.2d 1277 (8th Cir.), *cert. denied*, 419 U.S. 1012 (1974); Fulwood v. Clemmer, 206 F. Supp. 370, 373 (D.D.C. 1962)(Muslims entitled to first amendment privileges in prison because their faith, in its nature and effect on individuals, was comparable to that of recognized religious faiths); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964)(Indian users of peyote exempt from regulation banning such use because of their belief that such use brought them into contact with God); *cf.* Welsh v. United States, 398 U.S. 333 (1970)(plurality opinion)(individual entitled to statutory draft exemption granted

inquiry has an objective component as well, for the courts look at the belief-system itself to judge whether it can reasonably be thought capable of playing a religious role in the life of the individual adherent.[47]

The factor that governs this inquiry is an element of comprehensiveness. Speaking generally, the function of a religion is to provide the adherent with answers to the fundamental questions of life: the

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to religious objectors if the belief asserted to be religious imposed a duty of conscience, regardless of whether belief was characterized as religious by the individual); United States v. Seeger, 383 U.S. 163 (1965)(individual entitled to statutory draft exemption granted to religious objectors if his objection was based on belief that was meaningful and occupied role in his life analogous to belief in God in life of orthodox believer). *But cf.* Missouri Church of Scientology v. State Tax Comm'n, 560 S.W.2d 837, 842 (Mo. 1977)(Church of Scientology disqualified for property tax exemption because of lack of "belief in the Supreme Being"), *appeal dismissed*, 47 U.S.L.W. 3191 (U.S. Oct. 3, 1978). *See also* Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957) (group entitled to property tax exemption accorded those using buildings for religious purposes; group espoused a code of moral precepts and held weekly Sunday services similar to those of formal religions; at least some members of the group attached religious significance to their beliefs); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 692, 315 P.2d 394, 406 (1957)(humanist group entitled to religious property tax exemption; test for religious belief is whether the belief occupies the same place in the life of its holders as does an orthodox belief in the lives of its holders, and whether group conducts itself in the way that an orthodox religious group conducts itself).

47. For examples of determinations that a particular belief-system can sustain religious belief, see Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir.)(faith in Scientology, which provides a "general account of man and his nature comparable in scope, if not content, to those of some recognized religions," was religion for purposes of free exercise clause), *cert. denied*, 396 U.S. 963 (1969); Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973)(faith in "Eclat," the inanimate and supreme force or spirit pervading all things, was religion for purposes of free exercise clause), *aff'd per curiam*, 494 F.2d 1277 (8th Cir.), *cert. denied*, 419 U.S. 1012 (1974); Fulwood v. Clemmer, 206 F. Supp. 370, 373 (D.D.C. 1962)(Muslim faith is religion as it "calls for a belief in the existence of a supreme being controlling the destiny of man"); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (belief that users of peyote enter into direct contact with God religious for purposes of free exercise clause).

For examples of determinations that some belief-systems cannot reasonably sustain religious belief, see Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (dictum) (beliefs philosophical and personal, rather than religious, do not qualify as religions under religion clauses); Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir.)(prisoners' faith in "Eclat" not a religion but obviously a sham and an absurdity), *cert. denied*, 419 U.S. 1003 (1974); United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968)(Neo-American Church, whose symbol was a three-eyed toad, whose "key" was a bottle opener, whose sacramental foods were LSD and marijuana, whose official song was *Puff, The Magic Dragon*, and whose motto was "Victory over Horseshit!" found not to represent a religion within meaning of first amendment, where a member raised a free exercise claim in defense to a prosecution for possession of marijuana); *In re* McMillan, 30 N.C. App. 235, 238, 226 S.E.2d 693, 695 (1976)("deep rooted conviction for Indian heritage" not religious for constitutional purposes).

nature of existence and the role of the individual within that existence.[48] If a belief-system is to play in the life of an individual a role analogous to that played by conventional faiths, it must at least approximate the comprehensiveness of conventional religions in the number of relationships to which it is relevant and in the number of things it explains or the number of questions it answers.[49] This cosmological aspect of religion has at least three consequences that together distinguish religious from nonreligious belief. First, because religious belief is comprehensive, it has the potential to permeate everything the believer does.[50] Second, because its explanations can neither be empirically verified[51] or made understandable in solely rational terms,[52] religious belief must rest on faith. Third, religious belief

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48. *See* D. VANCE, THE SUPREME COURT AND THE DEFINITION OF RELIGION 86 (1970); Mansfield, *Conscientious Objection—1964 Term,* 1965 RELIGION & PUB. ORDER 3, 10. It is almost certainly true that the Founding Fathers and, originally, the Supreme Court conceived of religion almost exclusively in terms of traditional religious concepts. *See, e.g.,* United States v. Macintosh, 283 U.S. 605, 633-34 (1931)(Hughes, C.J., dissenting)("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."); Davis v. Beason, 133 U.S. 333, 342 (1890)(" '[R]eligion' . . . has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."); J. MADISON, *A Memorial and Remonstrance,* in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 162 (Philadelphia 1865)(Religion is "the duty which we owe to our Creator, and the manner of discharging it.").

Recent cases have expanded that conception. *See, e.g.,* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir.), *cert. denied,* 396 U.S. 963 (1969). *But see* Missouri Church of Scientology v. State Tax Comm'n, 560 S.W.2d 837, 842 (Mo. 1977)("[W]e conclude that the constitutional and statutory term religious worship [for the purposes of property taxation] embody [*sic*] as a minimum requirement a belief in the Supreme Being."), *appeal dismissed,* 47 U.S.L.W. 3191 (U.S. Oct. 3, 1978). Nevertheless, the notion of religion still remains firmly rooted in analogy to the world's major faiths. *See, e.g.,* United States v. Seeger, 380 U.S. 163 (1965).

49. *See* Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir.)(faith in Scientology held to be religious because it provided a "general account of man and his nature comparable in scope, if not content, to those of some recognized religions"), *cert. denied,* 396 U.S. 963 (1969).

50. "By its nature, religion—in the comprehensive sense in which the Constitution uses that word—is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives. Religious beliefs pervade . . . virtually all human activity." McGowan v. Maryland, 366 U.S. 420, 461 (1961)(Frankfurter, J., separate opinion).

51. *See* Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption?,* 27 VAND. L. REV. 209, 228 (1974)("Special creation is a supernatural doctrine that presupposes a creator the existence of which is empirically unverifiable. Because acceptance of the doctrine . . . must be a matter of faith, it is a *religious* doctrine . . . .")(footnotes omitted)(emphasis in original).

52. The very absurdity and impossibility of the [religious] statements . . . [are] the real ground for belief . . . . An improbable opinion has to submit sooner or later to correction. But the statements of religion are the

holds implications for society beyond the individual because a universal view must necessarily be held to be universally true.[53]

The comprehensive nature of religious belief helps to distinguish it from other kinds of belief and explain why it is given special constitutional status. First, because religious belief provides a comprehensive and potentially pervasive explanation of existence, its adoption or rejection by an individual is perhaps the most personal and significant decision he can make. Thus, choices with respect to religious belief are uniquely sensitive to governmental interference. Second, because religious belief is based to a large degree upon suprarational perceptions, while having strong societal implications, issues that revolve around religious belief rarely will be subject to rational political compromise.

These factors—the significance of the belief for the individual, its fundamentally suprarational character, and its implications for society—together create a tendency to promote, defend, and attack such belief with a peculiar vehemence. The uniquely bitter and ultimately irresolvable controversies that have surrounded religious issues explain why "[t]he Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief."[54]

This analysis helps explain the decisions of courts rejecting establishment clause challenges on the basis that no religious element was present. Public school programs that have survived such challenges have involved sex education,[55] instruction in the theory of evo-

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> most improbable of all and yet they persist for thousands of years. Their wholly unexpected vitality proves the existence of a sufficient cause which has so far eluded scientific investigation.

C. JUNG, *Transformation Symbolism in the Mass*, in 11 THE COLLECTED WORKS OF C.G. JUNG 201, 251 (1958); *see* United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943) (statutory draft exemption):

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it.

53. "A cosmic philosophy is not constructed to fit a man; a cosmic philosophy is constructed to fit a cosmos. A man can no more possess a private religion than he can possess a private sun and moon." G. K. CHESTERTON, *The Book of Job*, in G.K.C. AS M.C. 42 (J. de Fonseka ed. 1929).

54. McGowan v. Maryland, 366 U.S. 420, 465-66 (1961)(Frankfurter, J., separate opinion).

55. *See* Cornwell v. State Bd. of Educ., 314 F. Supp. 340 (D. Md. 1969)(upholding program), *aff'd per curiam*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970); Medeiros v. Kiyosaki, 52 Haw. 436, 478 P.2d 314 (1970)(upholding program).

lution,[56] and patriotic songs and ceremonies.[57] While all of these programs offend certain religious beliefs, none necessarily implicates a world view that is itself comprehensive enough to sustain or preclude religious belief. A sex education program is probably the easiest example of the three because the subject matter can be taught as a matter of verifiable fact, thus avoiding implication of any world view.[58] Evolution has a more comprehensive subject matter than sex education, relies more heavily on inferences that cannot be proven scientifically, and is probably more inconsistent with the major tenets of widely held religious beliefs.[59] Nevertheless, evolution does not necessarily implicate a particular world view. Thus, while promotion of evolution as an aid to the teaching of biology may endanger the free exercise rights of members of a creationist religion,[60] it does not create a reasonable potential of inducing religious belief. Patriotic promotions may come closer to presenting an issue of religious establishment, for patriotic feeling can be highly important to the individual, is suprarational in character, and clearly holds implications for society as a whole.[61] It is, therefore, comprehensive in the three senses mentioned above.[62] Nevertheless, patriotism is, by definition, limited in its scope.[63] It is at most only a partial explanation of the universe

56. *See* Wright v. Houston Independent School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972)(upholding public school instruction in evolution in biology class), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

57. *See* Sheldon v. Fannin, 221 F. Supp. 766, 774 (D. Ariz.)(upholding singing of national anthem), *appeal dismissed*, 372 U.S. 228 (1963). The establishment claim in *Fannin* was not that the state was promoting patriotism as a religion but that the state was promoting religion with a patriotic song that referred to "God." No case has involved the claim that promotion of patriotism as such is an establishment. Nevertheless, some religious groups have deemed certain patriotic ceremonies to be a form of idol worship. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

58. *See* Recent Developments, *The Constitutionality Under the Religion Clauses of the First Amendment of Compulsory Sex Education in Public Schools*, 68 MICH. L. REV. 1050, 1060 (1970)("Unless sex education courses *affirmatively espouse* the view that God is irrelevant to matters of sex . . . they should not be vulnerable to the argument that they constitute an establishment of religion.")(emphasis added). *See generally* Note, *Sex Education, The Constitutional Limits of State Compulsion*, 43 S. CAL. L. REV. 548 (1970).

59. *See* Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 517 n.14, 556 n.206, 558 n.211 (1978)(suggesting compatibility of the general theory of evolution with the religious belief of a Darwinistic humanist).

60. *See id.* at 518-43.

61. *See also* United States v. Seeger, 380 U.S. 163, 169, 187-88 (1965)(belief derived from "reading and meditation 'in our democratic American culture, with its values derived from the western religious and philosophical tradition,' " considered religious belief for draft exemption purposes).

62. *See* text accompanying notes 50-53 *supra*.

63. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943)("There is no mysticism in the American concept of the State or of the nature or origin of its authority.").

and the individual's role within it.

This requirement of comprehensiveness provides the first element of religious belief: its subject matter. But the fact that the belief-system is comprehensive to a degree that approximates that of conventional religions is not enough under either the free exercise or the establishment clause, for there are innumerable philosophies that may be regarded as comprehensive but that, in the abstract, would not be classified as religious. Nor do courts dealing with free exercise challenges to state programs stop with this abstract appraisal: once it is decided that the system *could* play a role analogous to conventional religion, the question remains whether it actually does.[64] And, under the free exercise clause, answering this question involves an examination of whether the belief is held with the sincerity and intensity that, at least theoretically, accompany adherence to the more conventional faiths.[65]

Patriotism could, of course, be elaborated into a comprehensive belief-system, Hitler's National Socialism being a possible example. *See generally* H. BAYNES, GERMANY POSSESSED (1941); E. JACKH, THE WAR FOR MAN'S SOUL (1943). But patriotism itself is love of country and nothing more. *See* R. COLLINGWOOD, FAITH AND REASON 140-41 (L. Rubinoff ed. 1968):

> Faith is the religious habit of mind. . . . [I]t is the attitude which we take up toward things as a whole. There is a certain analogy to it in the attitude which we take up toward a relative or limited whole like our country. . . . [B]ut in so far as it is not *the* whole but only *a* whole, that is, at bottom only a finite thing, it is at best only an earthly god and our worship of it is not pure worship but in part idolatrous.

64. Courts have addressed the issue whether a belief is sincerely held by asking whether a belief-system comprehensive by its terms is adhered to in practice, *see, e.g.*, Theriault v. Silber, 391 F. Supp. 578, 582 (W.D. Tex. 1975)(Eclatarian faith not religious as the church was a "masquerade" that encouraged "do-as-you-please philosophy"), *vacated and remanded per curiam*, 547 F.2d 1279 (5th Cir.), *cert. denied*, 434 U.S. 943 (1977); Banks v. Havener, 234 F. Supp. 27, 29 (E.D. Va. 1964)(Black Muslim movement a religion as "[c]onsiderable evidence was adduced explaining the dogma of the Muslims *and* its purported *effect on its adherents*")(emphasis added), and by asking whether a belief-system not necessarily comprehensive by its terms is nevertheless held to with religious devotion, *cf., e.g.*, Welsh v. United States, 398 U.S. 333, 340 (1970)(plurality opinion)(believer's sincere belief, even if "purely ethical or moral in source," is religious if it functions "as a religion in his life" by imposing a "duty of conscience"); United States v. Seeger, 380 U.S. 163, 166, 185 (1965)(beliefs in and "devotion to goodness and virtue for their own sakes" characterized as religious, since beliefs were sincerely and deeply held and were, in believer's "*own scheme of things*, religious")(emphasis in original). Both *Welsh* and *Seeger* construed language in the draft exemption provisions of the Selective Service laws, which required a "belief in a relation to a Supreme Being." That language was deleted by the Military Selective Service Act of 1967, Pub. L. No. 90-40, § 7, 81 Stat. 100.

65. In theory, at least, the inquiries into the subject matter of the belief, *see* D. VANCE, *supra* note 48; note 47 *supra*, and into the importance it holds in the life of the individual, *see* note 64 *supra*, are separable. For instance, one may nominally adhere to a traditional religious faith without taking the faith to heart. The faith of such an individual may be merely philosophical and not a matter of deep conviction. On the

Thus, a belief both comprehensive and sincere may qualify as religious under the free exercise clause.[66] A court will consider the offended belief or belief-system in the abstract to determine whether

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other hand, one may hold with conviction and zeal to certain beliefs or prejudices that do not truly implicate the comprehensive concerns of religion.

In practice, however, the two inquiries overlap. That the subject matter of the belief involved is clearly religious will reinforce the believer's claim that, for him, the belief is sincere and devout. Conversely, that the belief involved is held with deep conviction reinforces the believer's claim that the subject matter of the belief is religious in that, for him, it implicates matters of ultimate concern. *See* Clark, *Guidelines for the Free Exercise Clause,* 83 HARV. L. REV. 327, 339-40 (1969)("Any man who attempts to justify his action as right must relate it at some point in his thinking to some basic postulate concerning human life.").

Commentators have disputed whether a content-centered, theological view of religion or a more personal, psychological view is the more appropriate for free exercise purposes. *Compare id.* at 339-44 (advocating case-by-case inquiry into bona fides of individual belief, which need not be religious in any traditional sense), *with* Dodge, *supra* note 15, at 691-96, 712-15 (setting forth objective criteria of religion and criticizing any approach that focuses too exclusively on the individual), *and* Mansfield, *supra* note 48, at 10 (character and subject matter of truths asserted, rather than their subjective importance to the individual, are primary reasons for calling beliefs in those truths religious).

Dictum in Wisconsin v. Yoder, 406 U.S. 205 (1972), indicates that the content-centered view will prevail. In *Yoder,* Chief Justice Burger contrasted the "religious" beliefs of the Amish, based on the Bible, with the "philosophical" beliefs of a person such as Henry David Thoreau:

> [I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Id. at 216. For a criticism of this implicit rejection of the broad definition of religion endorsed in United States v. Seeger, 380 U.S. 163 (1965), see Wisconsin v. Yoder, 406 U.S. 205, 247-49 (Douglas, J., dissenting in part).

66. *See* D. VANCE, *supra* note 48, at 86 (discussing the Supreme Court's broad construction of religious belief for draft exemption purposes in United States v. Seeger, 380 U.S. 163 (1965)):

> [T]he resulting definition of religion rests upon two fundamental and related ideas. First, "religion" as a body of ideas is separable from other sets of ideas by the nature of the concerns of religious thought. Religious beliefs are primarily directed to providing a sense of order and comprehension when man faces such complex questions as the nature of man, the purpose of life, and the vastness of the universe. Religion represents a concern, then, for questions and problems transcending the concerns of political and social ideologies.
>
> The second principle or proposition evident in the new definition of religion concerns the impact of ideas upon the individual. The individual's response to these ultimate questions and concerns which are the province of religion will have an impact on the way he behaves and will provide him, on occasion, with a rationale for his behavior.

it is sufficiently comprehensive to be religious and then will determine whether the complainant truly holds to the offended belief.

The establishment clause, however, with its differing purpose, requires a different method. The concept of religious belief remains the same, but the method of determining whether religious belief is involved in a particular case must differ. As noted previously, the free exercise clause is primarily concerned with actual inhibitions of religious belief. As a result, courts need not consider potential inhibitions, for in a free exercise case there will be a litigant before the court claiming an actual and concrete infringement of his religious beliefs. The establishment clause, by contrast, is concerned with induction of religious belief. But rarely, if ever, will there be a person before the court claiming that a governmental program has instilled in him a religious belief in the system promoted. Moreover, even if there were, that would not be determinative, for the court must consider as well the interests of all those who are not present but who are nevertheless affected by the governmental program. As a consequence, the second stage of the inquiry—that into sincerity—must be done in the abstract. Whereas the free exercise inquiry is in part objective and in part subjective, the establishment inquiry must, in both aspects, be objective. Thus, while the inquiry into whether the belief-system in question can reasonably be said to be capable of playing a role analogous to that played by conventional religions is common to both the free exercise and establishment clauses, the inquiry into whether that is in fact the case gives way in an establishment clause challenge to an inquiry into the *likelihood* that, given govenmental support of this belief-system, someone will adopt it as a religion.[67]

67. Thus, given that a belief-system is capable of sustaining religious belief, it is religious for free exercise purposes if it is devoutly held by the individual claiming protection and is religious for establishment purposes if the individual claiming a violation can show a reasonable likelihood that state promotion of the belief-system will lead others to hold to it devoutly.

This distinction is roughly equivalent to that drawn by Professor Tribe, who calls that which is "arguably religious" a religion under the free exercise clause and that which is "arguably nonreligious" a nonreligion under the establishment clause. *See* L. TRIBE, *supra* note 15, at 827-28. Tribe's "arguably religious" versus "arguably nonreligious" is a useful shorthand but too vague a description by which to distinguish the free exercise and establishment clause concepts of religion. The distinction this Note provides is more precise. Recognition of the distinction between a belief-system merely *capable* of being religious and one *likely* to be so resolves the apparent contradiction between the contention of Justice Rutledge that religion must mean the same thing under both the establishment clause and the free exercise clause, *see* Everson v. Board of Educ., 330 U.S. 1, 32-33 (1947) (dissenting opinion) ("[T]he word governs two prohibitions and governs them alike."), and the "two-definition" approach suggested by several constitutional scholars, *see, e.g.*, P. KAUPER, RELIGION AND THE CONSTITUTION 31-32 (1964); Freund, *supra* note 40, at 1686 n.14 ("It may be suggested that a conventional definition of religion or religious practice is controlling in applying the non-

In answering this question, four factors should be taken into account: the degree to which the belief-system is comprehensive, whether it lays a claim to ultimate truth, whether it is supported by symbolic trappings, and whether it is promoted or espoused by an organized group. These factors are important for two reasons. First, each induces and fosters belief in the subject matter with which it is associated. Second, each factor is evidence of the extraordinary significance attached to the subject matter by the belief-system's adherents. When considered together, the four factors can guide a court in determining whether state involvement with a particular belief-system implicates the establishment clause.

Ralph Waldo Emerson once wrote that the test of a religion or philosophy is the number of things it explains.[68] The more questions that a belief-system answers, the more likely it is to be accepted by

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establishment clause, while a heterodox version is entitled to protection under the free-exercise clause, which safeguards the nonconformist conscience."); Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 266-67 (In a free exercise case the "claimants' view of religion controls the characterization of their objection as a religious one" while in an establishment clause case the challenged governmental action "must be essentially religious in some widely shared public understanding."); Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 57 AM. POL. SCI. REV. 865, 874 (1963)(footnotes omitted) (emphasis in original):

> [W]hen the issue is whether freedom to exercise religion has been *abridged* rather than whether religion has been established . . . the . . . suggestion that "religion" is not merely co-extensive with the better established and more highly organized sects, may be taken more seriously. For while the primary (although not exclusive) concern of the Establishment Clause is to resist the importunities of distinctly institutional religious pressures, the concern of the abridgment clause is to protect *individual* prerogatives of conscience, and not merely to protect the freedom of institutionalized religion or conscience.

Under the test considered here, religion will always refer to a supremely important and comprehensive belief, regardless of the religion clause involved, but the determination whether a state program implicates that belief will differ between the clauses. Because the free exercise clause aims chiefly to prevent "the severe psychic turmoil that can be brought about by compelled violations of conscience," Clark, *supra* note 65, at 336-38, a free exercise claim makes appropriate an inquiry that gauges the impact of governmental action upon particular individuals and thus delves into the sincerity of individual belief. Because the establishment clause aims at preventing potential induction of religious belief by proscribing laws "respecting an establishment," an establishment claim makes appropriate an inquiry that gauges the potential impact of governmental action on the public generally and thus mandates a consideration of objective factors that make it likely that a religious belief will be induced. Thus, while the *meaning* of religious belief remains constant under the religion clauses, a "two-definition" approach that reflects the differing *goals* of the religion clauses is appropriate to determine whether such belief is implicated by a particular state program.

68. R.W. EMERSON, JOURNALS (1836), *quoted in* INTERNATIONAL THESAURUS OF QUOTATIONS (paperback ed. 1970).

an individual as his explanation of life. The more comprehensive a state-promoted belief-system is, then, the more likely it is that the state is influencing religious choice by apparently recommending to the individual a faith that will color the way in which he perceives reality. Thus, while the degree of the comprehensiveness of a belief-system is not the only test of religion, it is one of several differentia.

Another factor that will tend to encourage religious belief is the belief-system's claim to ultimate truth. The proximate source of such a claim is typically a special revelation, as recorded in history or myth, or the mystical experience of the individual who subscribes to the belief.[69] The ultimate source is believed to be the force that orders the universe. If a belief promoted by the state is one whose validity or appeal rests in part on its transcendental reality or its divine origin, the likelihood that affected individuals will take the belief to heart is increased, for the source and subject matter of such belief is, by definition, beyond critical examination. It is an ideal that must be accepted or rejected on faith alone.[70]

The maintenance or strengthening of religious belief often depends on symbols, practices, rituals, myths, and celebrations. These trappings of religion serve to reify the abstract principles of a shared belief-system and give it an active and participatory character.[71]

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69. "All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of credulity than is invoked by representations of secular fact in commerce." United States v. Ballard, 322 U.S. 78, 94 (1944)(Jackson, J., dissenting).

70. Even if a belief or belief-system does not contain its own claim to ultimate truth, it may become religious, for establishment clause purposes, if the state promotes it in a manner that suggests it is ultimate truth. Thus, the state may not teach morality as divine law, *see* Malnak v. Mahesh, 440 F. Supp. 1284, 1317 n.20 (D.N.J. 1977), *appeal docketed,* Nos. 78-1568, 78-1569 (3d Cir. May 11, 1978), or affirm that any particular value-system is right and that its rivals are wrong. *Cf. Symposium—Constitutional Problems in Church-State Relations,* 61 NW. U.L. REV. 759, 811 (1966) (emphasis added):

> [A] possible test for determining whether a particular school practice conflicts with the establishment clause would be: whether a given practice takes the form of an intellectual exercise concerning questions of ultimate moral values, a general search for ultimate truth, or *whether it partakes of a certain mystical dogmatism resembling a ceremony or ritual.* This interpretation does not lend itself to "wall of separation" imagery, for it assumes—rightly or not depending on the particular case—the simultaneous existence of a secular (educational) practice and a religious (existential-humanistic) one.

The danger of inculcating religious belief through such dogmatic affirmations is particularly great when precollege school children are involved. *See* Tilton v. Richardson, 403 U.S. 672, 685-86 (1971).

71. Common examples of religious trappings are distinct moral codes, *see, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); belief in such supernatural phenomena as miracles, *see, e.g.,* United States v. Ballard, 322 U.S. 78 (1944) (group whose leaders

They thereby confirm and strengthen acceptance of the eternal and inexplicable truths that they symbolize.[72] When the state allies itself with groups that rely on such trappings, or when the state identifies itself with the trappings themselves,[73] the state lends to these trappings its own symbolic authority.[74] When, on the other hand, the state promotes a belief-system that lacks dogma, ceremony, and symbolism and that appeals solely to intellect or even to intuition, its promotion is far less effective. The belief-system is left in the realm of speculative philosophizing and is therefore less likely to achieve a concrete significance in the life of the individual.

Religious belief, while ultimately the concern of the individual, is almost necessarily the business of a group.[75] Coreligionists are likely

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claimed to have met Jesus Christ assumed to be religious); use of symbol, *see, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (crosses, crucifixes, paintings, and statues identifying building as religious); Allen v. Morton, 495 F.2d 65, 69 (D.C. Cir. 1973) (Tamm, J., concurring) (display of Christmas crèche); use of ritual, *see, e.g.*, State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975) (snake handling as religious practice), *cert. denied*, 424 U.S. 954 (1976); devotional reading of holy writings, *see, e.g.*, School Dist. v. Schempp, 374 U.S. 203 (1963); recitations of prayers or creeds, *see, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); wearing sacramental attire, *see, e.g.*, Zellers v. Huff, 55 N.M. 501, 517, 236 P.2d 949, 964 (1951) ("The wearing of religious garb and insignia [has] a propagandizing effect for the church, [and] by its very nature [introduces] sectarian religion into the school."); and the performance by clergy of certain formal ceremonies, such as marriages and funerals, *see, e.g.*, Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969).

72. *See generally* E. UNDERHILL, WORSHIP 20-41 (1937). "[A] sensible sign has been accepted as the representative of a supra-sensible Reality, in order that it may bridge the gap between the sensible and spiritual worlds . . . ." *Id.* at 29. "A symbol is a significant image, which helps the worshipping soul to apprehend spiritual reality." *Id.* at 42.

73. *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

74. *See also* School Dist. v. Schempp, 374 U.S. 203, 262-63 (1963) (Brennan, J., concurring) (The fatal flaw of the "released-time" program in Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), was that religious teachers were permitted to use public classrooms and were thus invested with "all the symbols of authority" at the command of the regular school teacher.).

75. "The really religious beliefs are always common to a determined group, which makes profession of adhering to them and to practising the rites connected with them . . . . In all history, we do not find a single religion without a Church." E. DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE 43-44 (1915); *see id.* at 423-25. *See generally* K. DUNLAP, RELIGION: ITS FUNCTIONS IN HUMAN LIFE 255-70 (1946). The relationship between symbolic trappings and group activity is apparent: "The most characteristic means of human worship are precisely those which the solitary does not require . . . the agreed symbols, and the established formulas and rites, which make concerted religious action and even concerted religious emotion possible, and so create the worshipping group." E. UNDERHILL, *supra* note 72, at 22.

> For purposes of the Establishment Clause, religion has pretty well been confined to the preachments of organized groups—which groups may at-

to organize, both to support each other in the discovery and application of the truths of their religion and to promote their beliefs in the outside world. Moreover, the more sophisticated the religion grows, the more necessary it becomes for the group to congregate around leaders who can codify and interpret its tenets, guide the adherents in the proper application of these tenets, and help maintain the tradition and discipline that will preserve the religion's integrity and appeal. That a state-sponsored belief-system is identified with an organized group increases the likelihood that state promotion will lead to strong personal adherence, since organization not only makes it possible for a group to manipulate the political process in the first place,[76] but also allows the group to build upon state promotion of its particular dogma by continuing to influence individuals after they have gone beyond the reach of the state program.

The four factors might best be reviewed in the context of assertedly nonreligious programs that nevertheless have possible religious implications. Consider, for instance, the possible establishment clause implications of a public school course in Darwin's theory of biological development. While this theory influences scientific methodology and the interpretation of empirical observations, it does not purport to explain or prescribe the individual's role in the universe. In short, Darwinism as biological theory is not sufficiently comprehensive to sustain a religious belief.[77] In addition, it does not appear

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tempt to manipulate the civil process to establish their own distinct theology through the law or attempt to wrest benefits from the civil process which are of special concern to them and not shared by a cross-section of persons outside their particular church or band of churches. The laws requiring the saying of prayers or the reading of scriptures in class, for instance, are clear example of distinct efforts at institutional religious aggrandizement, not primarily serving any needs or wants of others.

Van Alstyne, *supra* note 67, at 873-74; *see* Dodge, *supra* note 15, at 712-15. Dodge regards group affiliation as essential to a claim arising under the free exercise clause. This Note regards such affiliation as being more important in an establishment case than in a free exercise case, but truly essential to neither. What is important in either case is whether religious belief is burdened or established; that the belief in question is held by a cohesive group may contribute to the finding of a religious clause violation but it is hardly conclusive.

76. It is an unfortunate fact of history that when some of the very groups which had most strenously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies.

Engel v. Vitale, 370 U.S. 421, 427 (1962).

77. This is not, of course, to say that a belief-system comprehensive enough to be deemed capable of supporting religious belief could not be built on a foundation of Darwinism. *See, e.g.*, J. HUXLEY, RELIGION WITHOUT REVELATION 213-14, 217, 218, 219-20 (1957):

[E]volutionary biology has given us a new view, impossible of attainment

that Darwinism is promoted through claims of mystical revelation, the use of symbolism, or the activities of a missionary-minded group.

Public promotion of a philosophy such as Marxism presents a closer question. The theories of Karl Marx, which deal with social, economic, and historical development, provide a more complete explanation of the world, and the appropriate roles of individuals, or classes, within it, than do the theories of Charles Darwin, which deal with the history of biological development. Moreover, Marxism has attracted millions of adherents and has been called the state religion of some communist countries;[78] Marxism's dogmas have been likened to those of traditional religious faiths.[79] Nevertheless, several characteristics of Marxism and the social setting in which the state might promote it make its characterization as an establishment clause religion unlikely. First, Marxism lacks the degree of comprehensiveness observed in many religions. It concerns itself only with this world and not with transcendental realities, which it rejects as irrelevant. For the same reason, Marxism lays no clear claim to ultimate truth: mysticism and belief in special revelation are foreign to it. Finally, Marxism, as it exists in America, lacks the societal support and cere-

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> in any earlier age, of our human destiny. That destiny is to be the agent of the evolutionary process on this planet, the instrument for realising new possibilities for its future.
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> Biology . . . has thus revealed man's place in nature.
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> . . . .
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> . . . [T]he religion indicated by our new view of our position in the cosmos must clearly be one centred on the idea of fulfilment. Man's most sacred duty, and at the same time his most glorious opportunity, is to promote the maximum fulfilment of the evolutionary process on this earth; and this includes the fullest realisation of his own inherent possibilities.
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> . . . .
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> But if the individual has duties towards his own potentialities, he owes them also to those of others, singly and collectively. He has the duty to aid other individuals towards fuller development, and to contribute his mite to . . . the march of evolution as a whole.

For further indication of the compatibility between the general theory of evolution and religious humanistic beliefs, see Note, *supra* note 59, at 556 n.206, 558 n.211.

78. *See generally* Unterberger, *Russia's Established Religion,* 30 CHURCH & ST. 204 (1977) ("Russia's Established Religion" of Marxism-Leninism).

79. The scope of Marxism's concerns approaches that of a religion. Marxism, with its teleological approach to history, has been said to portray History as God, class exploitation as original sin, the coming classless society as heaven, and the proletariat as mankind's savior. *See* E. ALLEN, FROM PLATO TO NIETZCHE 165 (paperback ed. 1957). *See generally* G. NOVACK, HUMANISM AND SOCIALISM 5 (1973):

> At one time or another most of us have speculated about fundamental problems of human life. How did our species originate? What is the essence of being human? What lies ahead in social progress? Is freedom a delusion?
>
> These essays attempt to answer such questions from the standpoint of Marxist humanism.

monial trappings that it enjoys in a communist state. Given the absence of these factors, promotion of Marxism by the state will be unlikely to induce "religious" belief in an affected individual. The foregoing suggests that Marxism would be a candidate for the category of establishment clause religion only in the context of a state program that vigorously promoted it as the only valid way of apprehending reality. Only in such a context is it reasonably likely that individuals would intensely adhere to Marxism as a personal belief-system.[80] Only then would the state be invading the sacred province of religious choice.

The task of separating the secular from the religious will always remain one of "magnitude, intricacy and delicacy."[81] The analysis suggested above may not make the task any easier, but should make it more systematic and less intuitive. It derives its conception of religious belief from the values that the religion clauses of the first amendment most clearly protect: the right of the individual to be free from state interference in forming and observing his most personal and important beliefs.[82] The free exercise clause, concerned with observance of belief, requires an inquiry into individual sincerity, whereas the establishment clause, concerned with formation of belief, must deal with the objective likelihood that belief will be induced. The establishment clause is implicated, therefore, whenever a state-promoted belief-system is likely to produce and sustain the personal and important beliefs that the clause aims to insulate. The two elements that distinguish such beliefs from others, it has been suggested, are their comprehensiveness and the intensity with which they are held. The likelihood that a state program will instill such a belief depends in turn on the intrinsic nature of the belief-system and on the social setting in which state promotion occurs. Germane to the intrinsic nature of the belief-system are the degree of its comprehensiveness and the strength of its claim to ultimate truth. Germane to the social setting of the promotion are its forms of symbolic expression and the cohesiveness of the group that adheres to the belief-system. Having suggested the possible application of this analysis

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80. *See* note 70 *supra.*

81. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 237 (1948) (Jackson, J., concurring).

82. Conscience, as the common element in all religious experience, conceived as the recognition of moral dignity in oneself and other human beings, is the key to the status conferred upon religion in the first amendment. Establishment of religion is forbidden, not because religion was considered dangerous, but because only independent and conscientious religion, freely developed by individuals, is genuine religion.

Meiklejohn, *Religion in the Burger Court: The Heritage of Mr. Justice Black,* 10 IND. L. REV. 645, 671 (1977).

with respect to two broad theories that are in some ways akin to religion, the discussion will now turn to an application of the analysis, with far greater specificity, to Transcendental Meditation and the Science of Creative Intelligence.

II. THE SCIENCE OF CREATIVE INTELLIGENCE: AN ESTABLISHMENT CLAUSE RELIGION

Virtually unknown twenty years ago, when it was first introduced into the United States, Transcendental Meditation may now be America's most popular form of meditation.[83] About 650,000 Americans have taken the four-day TM course,[84] and a reported six million consider themselves "involved" in the practice.[85] Over 6000 certified TM instructors, operating out of at least 200 TM recruitment centers,[86] initiate thousands of TM practitioners each month.

TM owes much of its popular success to a series of clinical studies—most conducted by meditators themselves—that have concluded that TM produces a state of deep rest and significantly ameliorates several stress-related symptoms.[87] With this respectability has come official and semi-official support. TM has received favorable recognition or endorsement from state legislatures,[88] governors,[89] and con-

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83. Referring to the growth in TM's popularity since 1970, one writer has called it the "McDonald's of Meditation." *Tempest Over TM*, TIME, March 1, 1976, at 34.

84. 1 ENCYCLOPEDIA OF ASSOCIATIONS 506 (12th ed. 1978).

85. N.Y. Times, Nov. 18, 1976, at 24, col. 3 (Gallup Poll). According to one report, TM has 1.5 million followers in California alone. *See* San Francisco Examiner, July 19, 1977, at 1. TM may owe some of its popularity to endorsements by such public figures as the Beatles, Mia Farrow, Mary Tyler Moore, and Joe Namath.

86. 1 ENCYCLOPEDIA OF ASSOCIATIONS 506 (12th ed. 1978).

87. For instance, studies have concluded that TM affects oxygen consumption and heartbeat rates, EEG patterns, and blood lactate and skin resistance levels. The results suggest "TM provides a rest physiologically deeper than that of sleep." J. FOREM, *supra* note 2, at 59; *see, e.g.*, Wallace & Benson, *Physiological Effects of Transcendental Meditation*, 167 SCIENCE 1751-54 (1970); Wallace & Benson, *The Physiology of Meditation*, 226 SCIENTIFIC AM. 84-90 (1972). *See generally* sources cited in H. BENSON, THE RELAXATION RESPONSE 183-212 (paperback ed. 1976). Robert Keith Wallace undertook the investigations as a meditator and has since become president of Maharishi International University, the educational arm of the SCI/TM world organization. *See* note 146 *infra*. Herbert Benson, in an effort to maintain his objectivity, chose not to take TM lessons and has since concluded that TM is not uniquely effective. *See* text accompanying notes 251-54 *infra*.

88. In 1972, the Illinois legislature passed a resolution extolling TM and urging adoption of TM courses by the Illinois school system. *See* J. FOREM, *supra* note 2, at 240-42 app. A (quoting text of the Illinois resolution).

89. In 1973, Governor Marvin Mandel of Maryland proclaimed November 11-18 "World Plan Week." *See* Doerr, *Transcendental Meditation Goes to School*, 27 CHURCH & ST. 179 (1974). For a description of TM's World Plan, see notes 147-48 *infra* and accompanying text.

gressmen.[90] Major universities,[91] as well as public schools,[92] have offered accredited courses in SCI that feature TM as "lab work." TM has also won approval among governmental administrators,[93] who have instituted TM rehabilitation programs both in prisons and in government-sponsored drug abuse programs.[94]

While now popularly conceived of as a secular relaxation technique, TM has unmistakably religious origins. Its discoverer is Maharishi Mahesh Yogi, an Indian guru and Hindu monk who has explained TM as the gift of a Hindu god.[95] In fact, the TM movement in the United States began as a spiritual movement. The corporate articles of the Spiritual Regeneration Movement, for example, stated that "[t]he corporation is a religious one [the purpose of which is] to give instruction in a system of meditation . . . to worthy persons sincerely desirous of leading a more spiritual life."[96] Similarly, another TM group, the Students' International Meditation Society, stated that its corporate purpose was to "advance a spiritual transcendental system of meditation" and identified Mahesh as its "spiritual leader and teacher."[97] It is only since about 1968, when TM organizations generally purged their papers and literature of religious vocabulary,[98] that the theory underlying TM has become a "science,"[99] and several books have appeared that declare emphatically that TM is not religious, except perhaps to the extent that

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90. *See* 120 CONG. REC. 905 (1974) (remarks of Sen. Tunney).

91. *See* Maharishi International University, General Information Sheet 2-4 (Summer 1973) (on file at MINNESOTA LAW REVIEW).

92. *See* note 153 *infra* and accompanying text.

93. *See generally* N.Y. Times, Oct. 26, 1976, at 40, col. 1.

94. *See* note 29 *supra.*

95. *See* J. FOREM, *supra* note 2, at 209-10. Although many practitioners of TM refer to Mahesh as simply "maharishi," both "Maharishi" and "Yogi" appear to be titles while "Mahesh" is a family name. A maharishi (maharshi) is a great sage or seer, WEBSTER'S NEW INTERNATIONAL DICTIONARY 1482 (2d ed. 1934), and a yogi is one who practices a method of achieving identification of consciousness with an object of concentration, which may or may not be a deity, *id.* at 2974. Hereinafter Maharishi Mahesh Yogi will be referred to as Mahesh.

Mahesh is responsible for three major texts: MAHESH, MEDITATIONS OF MAHARISHI MAHESH YOGI (1968) [hereinafter cited as MEDITATIONS]; MAHESH, ON THE BHAGAVAD-GITA (paperback ed. 1969) [hereinafter cited as COMMENTARIES]; MAHESH, TRANSCENDENTAL MEDITATION (paperback ed. 1968) [hereinafter cited as TRANSCENDENTAL MEDITATION].

96. Spiritual Regeneration Movement Foundation, Certificate of Incorporation art. XI (as amended 1961), *quoted in* J. BJORNSTAD, *supra* note 3, at 88 app. C (emphasis deleted); *see* Malnak v. Mahesh, 440 F. Supp. 1284, 1319 (D.N.J. 1977), *appeal docketed,* Nos. 78-1568, 78-1569 (3d Cir. May 11, 1978).

97. Students International Meditation Society, Certificate of Incorporation art. II (1967), *quoted in* J. BJORNSTAD, *supra* note 3, at 88 app. C (emphasis deleted).

98. *See* J. BJORNSTAD, *supra* note 3, at 88-89 app. C.

99. *See* note 2 *supra.*

science, psychology, and religion may ultimately share some of the same concerns.[100]

But TM is not an end in itself. According to its theorists, it is a means, a technique[101] that allows its practitioners to experience "the state of eternal and absolute existence" by enabling the mind to travel "from the gross to the subtle states of creation until [it] arrives at the transcendent."[102] It is contact with the transcendent that represents the ultimate goal. Mahesh explains that just as a gardener must have knowledge of the "unseen root" before he can water a tree

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100. *See, e.g.*, H. BLOOMFIELD & R. KORY, HAPPINESS: THE TM PROGRAM, PSYCHIATRY AND ENLIGHTENMENT 98-101 (1976) (TM distinguished from prayer); A. CAMPBELL, SEVEN STATES OF CONSCIOUSNESS 10, 43 (1973) (although TM is religious in the "broadest sense," it is not "a religion, a philosophy, or a way of life"); D. DENNISTON & P. MCWILLIAMS, THE TM BOOK 14-19 (1975) (TM does not involve religious beliefs); J. FOREM, *supra* note 2, at 40 (TM is not based on an acceptance of any philosophy, nor is it religious or helped or hindered by faith in its efficacy; rather, it is simply a practice based on the "natural tendency of the mind to move in the direction of greater enjoyment."); R. KORY, THE TRANSCENDENTAL MEDITATION PROGRAM FOR BUSINESS PEOPLE 62-63 (1976) (TM is not a religion, nor does it interfere with a religion). These denials should be read with the knowledge that all of the authors are meditators and are or have been either TM teachers or administrators of TM organizations.

101. The technique is said to be natural and simple, yet it must be imparted personally by an instructor who has received lessons from Mahesh himself. *See* J. FOREM, *supra* note 2, at 12, 40. According to one source, however, Mahesh now "multiplies himself" through videotape. *See* M. EBON, THE RELAXATION CONTROVERSY 51 (1976). The initiate learns the technique in a series of four two-hour sessions at a cost of $65 for students and $125 for adults. *See* N.Y. Times, Aug. 24, 1975, at 34, col. 4. After completing the initial lessons, he is on his own to practice the technique twice daily for twenty-minute periods, although during the first year he may return to his instructor for monthly "checking" sessions. For accounts of the TM program, see D. KANELLAKOS & J. LUKAS, THE PSYCHOBIOLOGY OF MEDITATION (1974); Cyan, *TM Practice—A New Drug?*, in TM: HOW TO FIND PEACE OF MIND THROUGH MEDITATION 46 (M. Ebon ed. 1975); Meyer, *The TM Empire: It's Transcendental Meditation Time*, Washington Post, Sept. 21, 1975, § A, at 1, col. 5 [hereinafter cited as *It's Meditation Time*].

Various advanced programs, including courses and lectures on SCI, weekend and month-long residence programs, teacher training programs, and advanced instruction in the TM technique, are also offered by the TM organization at costs ranging from $45 to $1800. *See* Meyer, *The TM Empire: TM Takes on Corporate Look in U.S.*, Washington Post, Sept. 22, 1975, § A, at 1, col. 1 [hereinafter cited as *TM's Corporate Look*]; Meyer, *The TM Empire: TM University: 'Bold in Its Thinking,'* Washington Post, Sept. 24, 1975, § A, at 1, col. 1 [hereinafter cited as *TM University*].

102. TRANSCENDENTAL MEDITATION, *supra* note 95, at 46. Mahesh also uses the metaphor of an ocean to explain this process:

> A thought starts from the deepest level of consciousness, from the deepest level of the ocean of mind, as a bubble starts at the bottom of the sea.
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> . . . .
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> . . . If there were a way to consciously appreciate all the states of the bubble of thought prior to its reaching the surface level, that would be the way to transcend thought and experience the transcendental Being.

Id. at 47-48.

and make it green, so must a person understand the "fundamental reality of life that lies in the field of abstract Being, in order to glorify the whole of the rest of life."[103]

Mahesh describes the "transcendental reality" that one encounters during TM as the field of creative intelligence, or "Being."[104] This "Being" has "the status of the omniscient, omnipotent supreme lord of the universe."[105] "Being," Mahesh explains,

> is the unmanifested reality of all that exists, lives, or is. The Being is the ultimate reality of all that was, is or will be. It is eternal and unbounded, the basis of all the phenomenal existence of the cosmic life. It is the source of all time, space, and causation. It is the be all and end all of existence, the all-pervading eternal field of the almighty creative intelligence. *I am That eternal Being, thou art That and all this is That eternal Being in its essential nature.*[106]

This description should make it clear that SCI is comprehensive enough to play the role of a religion in the life of an individual and that a sincere believer in SCI could claim the protection of the free exercise clause were the government to interfere with his practice of TM. Whether SCI is a religion for purposes of the establishment clause depends on the further question whether governmental pro-

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103. *Id.* at xvi.

104. *Id.* at 46; *see* COMMENTARIES, *supra* note 95, at 491 ("Transcendental Meditation brings the mind to the state of Being.").

105. TRANSCENDENTAL MEDITATION, *supra* note 95, at 25. Mahesh's concept of Being is virtually indistinguishable from the Hindu concept of deity. *See* note 106 *infra* and accompanying text. Indeed, Mahesh, by speaking of the ancient Hindu hymns praising "the Being, the ultimate reality, the Brahman which is the supreme ultimate absolute," explicitly links the two. TRANSCENDENTAL MEDITATION, *supra* note 95, at 33. The similarities between the concept of Being central to SCI and that of God in Christianity and Being in Hinduism and Buddhism formed the primary basis for the court's conclusion, in *Malnak,* that SCI constituted an establishment clause religion. *See* Malnak v. Mahesh, 440 F. Supp. 1284, 1320-22 (D.N.J. 1977), *appeal docketed,* Nos. 78-1568, 78-1569 (3d Cir. May 11, 1978).

106. TRANSCENDENTAL MEDITATION, *supra* note 95, at 21-22 (emphasis in original); *cf.* United States v. Seeger, 380 U.S. 163, 189-90 (1965) (Douglas, J., concurring):

> According to the Upanisads, Hindu sacred texts, the Supreme Being is described as the power which creates and sustains everything, and to which the created things return upon dissolution. The word which is commonly used in the Upanisads to indicate the Supreme Being is Brahman. Philosophically, the Supreme Being is the transcendental Reality which is Truth, Knowledge and Bliss. It is the source of the entire universe. In this aspect Brahman is Isvara, a personal Lord and Creator of the universe, an object of worship. But, in the view of one school of thought, that of Sankara, even this is an imperfect and limited conception of Brahman which must be transcended: to think of Brahman as the Creator of the material world is necessarily to form a concept infected with illusion, or *maya*—which is what the world really is, in highest truth. Ultimately, mystically, Brahman must be understood as without attributes, as *neti neti* (not this, not that).

motion would raise an unacceptable likelihood of inducing such a belief in some individuals. This Note has suggested that a court, in answering this question, should consider four factors: the degree of comprehensiveness, the presence of a claim to ultimate truth, the association of the belief-system with religious trappings, and its identification with an organized group. These four factors in turn fall into two categories. With respect to the first two, the court will look to the belief-system itself; with respect to the latter two, the court will look to the broader social context of the state's program.

A. Intrinsic Factors

In the first section of this Note, it was suggested that religious belief was comprised of two elements, a comprehensive subject matter and an intensity of acceptance analogous to that associated with conventional religions. It is one of the basic premises of this Note that almost any idea—be it patriotism, Darwinism, Marxism—can be converted by an individual into a personal religion if the individual extrapolates from that idea a comprehensive set of implications and adopts that developed belief-system as his ultimate reality. But it seems reasonable to conclude that the less "construction" the individual must perform to satisfy those requirements, that is, the more that is provided a priori by the belief-system itself, the more likely it is that an individual may actually accept the doctrine as his religion. Thus, the more comprehensive the system, the less the adherent must add to enable it to play that role in his life that is played by religion. Similarly, the stronger the claim to ultimate truth that the belief-system makes, the easier it is for the individual to adopt that system as descriptive of his ultimate reality: it is always easier to believe that something suprarational is true because some distant prophet has had a revelation than it is to construct a faith on one's own.

With regard to its degree of comprehensiveness, there is little that a potential adherent need add to SCI to make it fully as comprehensive as conventional religions.[107] SCI provides the potential believer with an explanation of the fundamental mystery: the nature of existence. Moreover, it has the potential to permeate not only the way the individual orders reality, but also the way in which he acts, for contact with Being, achievable through TM, purportedly enables one to cope with life's problems[108] and provides new significance to any

107. The comprehensiveness of SCI's subject matter helps explain the hostile response it has evoked from those of traditional faiths. *See* note 140 *infra*.

108. "The cause of mental and physical suffering in the world is the lack of knowledge of the Being and ignorance of the fact that by infusing the value of the Being into the mind, body, and the environment, the very cause of all disease and suffering could be eliminated." Transcendental Meditation, *supra* note 95, at 206.

endeavor.[109]

A further indication of SCI's religious nature is that it makes a clear claim to ultimate truth. As explained by Mahesh, SCI by its terms purports to describe the "real" nature of existence.[110] Those who reject that explanation are considered ignorant or benighted, not in any derisive sense, but with the attitude of one who believes he has access to a reality as yet unrevealed to others.[111]

This claim to ultimate truth is buttressed by reference to a divine revelation. The source of the revelation is the *Bhagavad-Gita,* a Hindu scripture recounting the battlefield dialogue between Lord Krishna (an incarnation of Vishnu, the second person of a divine trinity) and Arjuna, the greatest warrior of his day. In verse 45 of chapter two, Krishna exhorts, "Be without the three gunas, [be without activity], O Arjuna, freed from duality, ever firm in purity, independent of possessions, possessed of the Self."[112] Although there are many interpretations of the *Bhagavad-Gita,* Mahesh has an interpretation of his own:

> Arjuna should bring his attention from the gross planes of experience, through the subtle planes and thus to the subtlest plane of experience; transcending even that subtlest plane, he will be completely out of the relative field of life, out of the three gunas. So the Lord's words: 'Be without the three gunas', reveal the secret of arriving at the state of pure consciousness.[113]

In Mahesh's view, the words of Krishna suggest "a technique that enables every man to come to the great treasure-house within himself and so rise above all sorrows and uncertainties in life."[114] As Mahesh later makes clear, the "technique" is TM.[115] Thus TM and, by impli-

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109. [Maharishi International University] students are introduced to the fundamental principles of many fields, from physics and philosophy to literature and economics, all organized and illumined by the Science of Creative Intelligence. It is for this reason that the MIU first-year curriculum is entitled "A Vison of All Disciplines in the Light of the Science of Creative Intelligence."

MAHARISHI INTERNATIONAL UNIVERSITY, BULLETIN OF INFORMATION, 1977-78, at 8 (1977).

110. *See* COMMENTARIES, *supra* note 95, at 228-29 ("[R]ealization of the state of all knowledge [through TM] is the only way to salvation and success in life; there is no other way."); TRANSCENDENTAL MEDITATION, *supra* note 95, at 96 ("Only the regular practice of transcendental deep meditation brings a man to that status where he finds himself placed in the situation in which the almighty power of nature works for him.").

111. *See, e.g.,* COMMENTARIES, *supra* note 95, at 319 ("[M]editation is a process which reveals Reality to the ignorant. . . . [I]t brings faith to the faithless and dispels the doubts in the mind of the sceptic by providing direct experience of Reality.").

112. *Id.* at 126.

113. *Id.* at 129.

114. *Id.* at 131.

115. *Id.* at 137.

cation, its underlying cosmology, SCI, are given the imprimatur of divine truth.

B. Extrinsic Factors

In positing a dogmatic explanation of the universe and the individual's role within it, SCI bears the characteristics of religious doctrine. The social context in which it is found indicates that it also functions as a religion. Proponents of TM might argue that SCI cannot be a religion because it lacks many of the trappings normally associated with conventional religions. They might, for instance, point out that SCI involves no clergy, no group ritual, no congregational meetings, nor any specific moral code.[116] Such arguments can be evaluated on two levels. First, it appears that in many respects they are simply inaccurate. TM instructors, who initiate new meditators and occasionally check on their progress, are associated directly with the founder of the TM movement;[117] in performing the puja and in teaching TM as a means to achieve bliss, they perform functions roughly analogous to those performed by clergy. Moreover, while meditators do not periodically congregate to perform group rituals, they are invited to attend lectures on SCI, to participate in "residence programs," and to experiment with group meditation.[118] Finally, it appears that, in fact, SCI/TM does have something like a moral code in that TM purportedly produces a spontaneous appreciation of right and wrong.[119]

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116. *See* Malnak v. Mahesh, 440 F. Supp. 1284, 1326 (D.N.J. 1977), *appeal docketed,* Nos. 78-1568, 78-1569 (3d Cir. May 11, 1978).

117. *See* notes 244-45 *infra* and accompanying text.

118. *See* note 101 *supra. See generally* D. Kanellakos & J. Lukas, *supra* note 101, at 123-25 app. B.

119. *See, e.g.,* Transcendental Meditation, *supra* note 95, at 228 ("If the transcendental deep meditation is given to all students, they will grow in a right sense of values and be citizens of their country with a broad vision of life and a right, true sense of judgment of right and wrong.").

At Maharishi International University, students are asked to observe a strict code of dress and behavior. According to a *Washington Post* account, applicants to MIU must submit a recommendation from a TM teacher, evaluating the "applicant's devotion to meditating, his participation in local TM center's activities, [and] his 'clarity of understanding of principles' of TM and SCI." The teacher must also confirm that the applicant has a "neat, acceptable appearance." The applicant himself must list his TM-related activities and describe TM's impact on his life. *TM University, supra* note 101, § A, at 5, col. 2. The MIU student handbook reveals additional elements of a moralistic code: since " 'each student represents maharishi and the World Plan in the eyes of his fellow students, the community and indeed the world, . . . each should display the highest degree of dignity and propriety in his private life and his social behavior, both on campus and off . . . .' " The handbook continues, " 'As the future leaders of the world, MIU students are expected to honor the society's tradition of dignified dress and grooming.' " No drugs or alcoholic beverages are allowed on cam-

In a larger sense, however, these arguments are irrelevant. There are no particular activities that will provide a basis for automatic determinations of whether a belief-system is religious. The relevant question is not whether SCI/TM possesses or lacks certain ecclesiastical forms, but whether the activities associated with it create the likelihood of religious belief in SCI.

Like many religious rituals, TM is a physically passive routine, performed with the eyes closed. The mind is permitted to drift beyond the bounds of ordinary rational or sensory experience. TM's appearance and the regularity with which it is performed closely resemble the silent meditation or prayer of traditional religion. Indeed, insofar as the purported effect of TM is to put the practitioner in contact with the force that orders the universe,[120] the analogy to prayer is compelling. Moreover, TM's Sanskrit mantras, even if they have no religious denotation,[121] have a centuries-old relationship with Hinduism and Buddhism.[122] This relationship increases the likeli-

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pus, nor is smoking allowed in public places. *Id.* at col. 6 (quoting MIU Student Handbook).

120. *See* notes 101-06 *supra* and accompanying text.

121. Investigators of TM have speculated that there are exactly seventeen mantras, *see The TM Craze: Forty Minutes to Bliss, supra* note 29, at 91, and one source has claimed that at least seven of the TM mantras "refer to Hindu gods and goddesses [whose names] are used in Vedic worship rites." Fulton, *supra* note 3, at 1125.

One Hindu scholar, however, has stated that the mantras with which he is familiar are not the names of deities but rather have meanings that are totally mundane. For instance, he said that one reputed TM mantra, "shyam," means a "dark-colored person." Affidavit of K. L. Seshagiri Rao at 3, (on file at MINNESOTA LAW REVIEW) Malnak v. Mahesh, 440 F. Supp. 1284 (D.N.J. 1977), *appeal docketed,* Nos. 78-1568, 78-1569 (3d Cir. May 11, 1978).

122. In Hindu and Buddhist tradition, mantras have customarily had definite religious connotations. *OM,* the mantra par excellence, is identified with all the great Hindu gods. *See* M. ELIADE, YOGA, IMMORTALITY, AND FREEDOM 212 (2d ed. 1969). One student of Hinduism has written:

> A mantra may, or may not, convey on its face its meaning. Bīja (seed) mantra, such as Aiṁ, Klīṁ, Hrīṁ, have [*sic*] no meaning, according to the ordinary use of language. The initiate, however, knows that their meaning is the own form . . . of the particular [deity], whose mantra they are . . . . Every mantra is, then, a form . . . of the Brahman . . . .
>
> . . . .
>
> . . .Though the purpose of worship (pūja) . . . and that of the [mantra] are the same, the latter is far more powerful . . . . The special mantra which is received in initiation . . . is the bīja or seed mantra, sown in the field of the . . . heart.

J. WOODROFFE, INTRODUCTION TO TANTRA SĀSTRA 84-85 (3d ed. 1956). Mircea Eliade has written that Hindu tradition raised mantras to the "dignity of a vehicle of salvation" and that their

> unlimited efficacy . . . is owing to the fact that they *are* (or at least, if correctly recited, *can become*) the "objects" they represent. Each god, for example, and each degree of sanctity have a *bīja-mantra,* a "mystical

hood that a practitioner of TM will attribute some religious significance to his practice. Finally, TM has recently been associated with the claim that it enables its practitioners to perform such "supernormal feats," or "siddhis,"[123] as flying, levitating, and disappearing.[124] Regardless of the veracity of such claims, siddhis are by definition supernatural and must for the adherent to TM enhance its significance beyond the mundane and secular.

Another ritual associated with SCI is TM's initiation ceremony, or puja.[125] The puja is performed by a TM instructor in an atmosphere of candlelight and burning incense. The initiate is asked to bring to the ceremony flowers, fruit, and a white handkerchief, all chosen for their symbolic meaning.[126] The instructor places these items on a cloth-covered table supporting a framed portrait of Jai Guru Dev, Mahesh's teacher and the man whom he credits with "rediscovering" the TM technique.[127] The initiate is asked to remove his shoes before

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sound," which is their "seed," their "support"—that is, their very *being*. By repeating this *bīja-mantra* in accordance with the rules, the practitioner appropriates its ontological essence, concretely and directly assimilates the god, the state of sanctity . . . .

M. ELIADE, *supra* at 215. Another student has written:

> The *mantras* are instruments. Partly they are without meaning and often they are not understood by him who reads them. They have fixed places in the ritual and varied effects and cannot be interchanged.
>
> . . . .
>
> [Mantras] hold the gods and can be directed. . . . In that way the performer of the rites draws into himself the divine . . . .

C. DIEHL, INSTRUMENT AND PURPOSE: STUDIES ON RITES AND RITUALS IN SOUTH INDIA 94, 100 (1956).

123. On siddhis generally, see M. ELIADE, *supra* note 122, at 85-90.

124. *See I'm the Maharishi—Fly Me*, PSYCH. TODAY, August 1977, at 29; *Maharishi over Matter*, NEWSWEEK, June 13, 1977, at 98; *Seer of Flying*, TIME, August 8, 1977, at 75. According to one of these accounts, Mahesh announced to some 900 TM teachers, in January 1977, that it was now time "to discuss such phenomena as levitation, invisibility, and mastery over the fundamental forces of nature in general." *I'm the Maharishi*, *supra* at 29. One meditator, anticipating the benefits of such abilities, related, "Once you have experienced the absolute [through TM]—even for a few minutes—flying is not a very big deal. I guess I will eventually walk through a wall, but the technique I want most is omniscience and knowledge of other planets." *Seer of Flying*, *supra* at 75.

The International Meditation Society has released photographs of such activities, but has refused to demonstrate them publicly. *See id.* Mahesh has reportedly forbidden demonstrations of the siddhis, on the ground that public displays would be "undignified." *Id.*

125. *See* Malnak v. Mahesh, 440 F. Supp. 1284, 1305-08 (D.N.J. 1977), *appeal docketed*, Nos. 78-1568, 78-1569 (3d Cir. May 11, 1978); Fulton, *supra* note 3, at 1124; *It's Meditation Time*, *supra* note 101, § A, at 8, col. 4.

126. The flowers represent the "flowers of life," the fruit the "seed of life," and the white handkerchief the "cleansing of the spirit." *The TM Craze: Forty Minutes to Bliss*, *supra* note 29, at 72.

127. After the TM technique was given to Arjuna, 5000 years ago, *see* text accom-

entering the room, and he stands or sits in front of the table while the instructor sings a Sanskrit chant, periodically bows before the table, and moves several items, including those brought by the initiate, from one spot on the table to another. At the end of the ceremony the initiate receives the Sanskrit mantra that the teacher has selected especially for him.[128]

While the atmosphere of the puja and its heavy reliance on symbolism may not evoke a religious response in the participants, the experience must at least be classified as mystical. Moreover, the words of the Sanskrit chant are explicitly religious, invoking various Hindu deities and figures in the TM tradition.[129] As such, the chant

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panying notes 112-15 *supra*, the teaching was reportedly lost and then rediscovered by Buddha. Obscured by Buddha's followers, the true teaching was rediscovered by Shan Kara, a great interpreter of the Hindu scriptures, about 2500 years ago. Obscured once more by misuse and neglect, the teaching was revived in modern times by Mahesh's own teacher, Swami Brahmananda Saraswati, or Guru Dev. *See* J. FOREM, *supra* note 2, at 203-04. It is this history of recurrent loss and rediscovery that has apparently led Mahesh to believe that the "purity" of the teaching must be preserved, even at the cost of limiting its immediate spread. To ensure that the practice remains pure, teachers of TM must be authorized only by Mahesh.

128. The source of the instructor's ability to select a mantra peculiarly suited to the initiate's personality after only casual acquaintance with him is unknown. One possibility is that the instructor relies on a questionnaire that the initiate is required to fill out to select the mantra generally considered best for a person of that particular occupation, with those particular sleeping habits, and so forth. *See It's Meditation Time*, *supra* note 101, § A, at 8, col. 5.

Although the initiate must sign a form promising never to reveal his mantra to anyone, some meditators have reneged. Examples of Sanskrit sounds reportedly used as TM mantras (transliterated from the Sanskrit) include: ing, inga, ima, iama, sharling, shring, shamuth, sherim, hime, ram, kirim, shyam, and shri ram. *See* Fulton, *supra* note 3, at 1125; *TM University*, *supra* note 101, § A, at 5, col. 1.

129. An English translation of the puja chant, entered into evidence in the *Malnak* case, reads as follows:

> "Invocation
> Whether pure or impure, where purity or impurity is permeating everywhere, whoever opens himself to the expanded vision of unbounded awareness gains inner and outer purity.
> Invocation
> To Lord Narayana, to lotus-born Brahma the Creator, to Vashishtha, to Shakti and his son Parashar,
> To Vyasa, to Shukadeva, to the great Gaudapada, to Govinda, ruler among the yogis, to his disciple,
> Shri Shankaracharya, to his disciples Padma Pada and Hasta Malaka
> And Trotakacharya and Vartika-Kara, to others, to the tradition of our Master, I bow down.
> . . . .
> To Shankaracharya the redeemer, hailed as Krishna and Badarayana, to the commentator of the Brahma Sutras, I bow down. To the glory of the Lord I bow down again and again, at whose door the whole galaxy of gods pray [*sic*] for perfection day and night.
> . . . .

is not significantly different from a prayer recited in Latin.

Proponents of TM might argue that, regardless of SCI's religious nature, TM should not itself be considered religious inasmuch as it is totally severable from its underlying theory. That is, TM can be taught, practiced, and enjoyed without reference to SCI.[130] Similarly, the puja may be interpreted in secular as well as religious terms. Although "puja" originally meant worship[131] and denoted a Hindu

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Skilled in dispelling the cloud of ignorance of the people, the gentle emancipator, Brahmananda Sarasvati, the supreme teacher, full of brilliance, Him I bring to my awareness.
Offering the invocation of the lotus feet of Shri Guru Dev, I bow down.
Offering a seat to the lotus feet of Shri Guru Dev, I bow down.
Offering an ablution to the lotus feet of Shri Guru Dev, I bow down.
Offering a cloth to the lotus feet of Shri Guru Dev, I bow down.
Offering a sandalpaste to the lotus feet of Shri Guru Dev, I bow down.
Offering full rice to the lotus feet of Shri Guru Dev, I bow down.
Offering a flower to the lotus feet of Shri Guru Dev, I bow down.
Offering incense to the lotus feet of Shri Guru Dev, I bow down.
Offering light to the lotus feet of Shri Guru Dev, I bow down.
Offering water to the lotus feet of Shri Guru Dev, I bow down.
Offering fruit to the lotus feet of Shri Guru Dev, I bow down.
Offering water to the lotus feet of Shri Guru Dev, I bow down.
Offering a betel leaf to the lotus feet of Shri Guru Dev, I bow down.
Offering a coconut to the lotus feet of Shri Guru Dev, I bow down.
Offering camphor light
White as camphor, kindness incarnate, the essence of creation garlanded with Brahman, ever dwelling in the lotus of my heart, the creative impulse of cosmic life, to That, in the form of Guru Dev, I bow down.
. . . .
Guru Dev, Shri Brahmananda, bliss of the Absolute, transcendental joy, the Self-Sufficient, the embodiment of pure knowledge which is beyond and above the universe like the sky, the aim of 'Thou art That' and other such expressions which unfold eternal truth, the One, the Eternal, the Pure, the Immovable, the Witness of all intellects, whose status transcends thought, the Transcendent along with the three gunas, the true preceptor, to Shri Guru Dev, I bow down.
The blinding darkness of ignorance has been removed by applying the balm of knowledge. The eye of knowledge has been opened by Him and therefore, to Him, to Shri Guru Dev, I bow down.
Offering a handful of flowers to the lotus feet of Shri Guru Dev, I bow down."

440 F. Supp. at 1306-07 (brackets in original). This partial translation is similar to those that have appeared in other sources. *See* Fulton, *supra* note 3, at 1124; *The TM Craze: Forty Minutes to Bliss, supra* note 29, at 74.

130. *See* A. CAMPBELL, *supra* note 100, at 11 ("Transcendental meditation is complete in itself. Being entirely practical, it does not depend upon belief or acceptance of theories; all that is needed for successful practice is a simple willingness to experiment.").

131. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2008 (2d ed. 1934).

religious ceremony, the term is also used outside of Hinduism to denote a traditional ceremony of gratitude to persons living or dead.[132] Moreover, for the typical initiate, who plays no active role in the ceremony and is unlikely to understand the religious terminology of the Sanskrit chant, the puja may have little or no religious significance.[133] Even for the initiate who understands the terminology, the words may have no more religious significance than does the reference to Greek deities in the Hippocratic Oath.

Such an argument fails, however, because it emphasizes immediate, subjective perceptions. While a focus on the actual belief of a practice's participants is appropriate in applying a test for religion in the free exercise context, in an establishment clause case the focus is on the likelihood that the practice will promote religious belief.[134] The ceremonies themselves, by implying a link to ultimate reality and by giving a particular practice a suprarational, mystical significance, have a marked tendency to induce religious belief. A person who begins TM with only secular motivation may, after experiencing success with it, explore its theoretical underpinnings and come to believe, with Mahesh, that "Transcendental Meditation is a path to God."[135] In fact, it appears that such is both an expectation and a goal of the TM program generally. In his commentaries on the *Bhagavad-Gita,* Mahesh states that, for the person who has faith, "[m]editation is a process which provides increasing charm at every step on the way to the Transcendent. The experience of this charm causes faith to grow."[136] Even for the person who does not yet have faith, Mahesh maintains that the practice "can be started from whatever level of faith a man may have, for it brings faith to the faithless and dispels the doubts in the mind of the sceptic by providing direct experience of Reality."[137]

A final argument supporting TM's claim to secularity emphasizes its compatibility with traditional religions.[138] TM is reportedly practiced by members of diverse faiths, and Mahesh claims that

132. *See generally* Malnak v. Mahesh, 440 F. Supp. 1284, 1309-10 (D.N.J. 1977), *appeal docketed,* Nos. 78-1568, 78-1569 (3d Cir. May 11, 1978); FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 1928 (rev. ed. 1964) (spelled "pooja").

133. *See generally* Malnak v. Mahesh, 440 F. Supp. 1284, 1311 (D.N.J. 1977), *appeal docketed,* Nos. 78-1568, 78-1569 (3d Cir. May 11, 1978).

134. *See* notes 64-67 *supra* and accompanying text.

135. MEDITATIONS, *supra* note 95, at 59, *quoted in* LaMore, *supra* note 29, at 1135.

136. COMMENTARIES, *supra* note 95, at 317.

137. *Id.* at 319.

138. Some find TM not only compatible with but complementary to their faiths. *See, e.g.,* D. DENNISTON & P. MCWILLIAMS, *supra* note 100, at 16-18 (correspondence from rabbi, priest, and minister, each recommending TM and denying any conflict between it and his faith).

> it does not matter whether they call themselves Christian, Mohammedan, Hindu, or Buddhist. . . . On the gross level of life these names carry significance, but on the level of Being, they all have the same value.
>
> . . . The key to fulfillment of every religion is found in the regular practice of transcendental deep meditation.[139]

Whether TM is indeed compatible with conventional religious faith is a matter of sharp dispute.[140] But even if it were, TM's nonsectarian nature would be of questionable constitutional significance. That a concept is compatible with many religious faiths does not make it nonreligious. For example, the Bible-reading program in *School District v. Schempp*[141] was purportedly compatible with many religious faiths.[142] But as Justice Brennan explained in concurrence, "[t]here are persons in every community—often deeply devout—to whom *any* version of the Judaeo-Christian Bible is offensive."[143] Much the same can be said of the nondenominational prayer in *Engel v. Vitale*:[144] *any* prayer, no matter how general, is so clearly connected with recognizably religious world views[145] that it increases the likelihood that its observers and participants will develop a belief in the belief-system with which it is connected.

Further enhancing the likelihood that a participant in a state-sponsored SCI/TM program will develop a religious belief in SCI is the nature of the large network of organizations that actively promote it.[146] Each organization was founded and is directed by Mahesh. The

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139. TRANSCENDENTAL MEDITATION, *supra* note 95, at 254-55.

140. The claim that TM is religious often comes from fundamentalist Christians and Jews who consider TM a neo-Hindu practice antithetical to their faiths. *See, e.g.*, J. BJORNSTAD, *supra* note 3, at 24-25 ("When one practices TM one is serving and adoring Brahman.") (In Hindu theology, Brahman is the Creator and Supreme Spirit that pervades the universe.); G. LEWIS, *supra* note 3, at 21 ("Any Christian who attempts to practice TM with any understanding of its objective becomes unfaithful to the Bible's transcendent, tri-personal Creator, Redeemer and Counselor."); *Beware of TM*, 19 CHRISTIANITY TODAY 1168 (1975) ("TM is permeated with the Hindu life and world view."). It would be overly simplistic, however, to attribute this critique of TM exclusively to Christians and Jews, for it has also come from nonsectarian sources. *See, e.g., Up, Up and Away*, 30 CHURCH & ST. 150 (1977).

141. 374 U.S. 203 (1963).

142. *See id.* at 281-82 (Brennan, J., concurring).

143. *Id.* at 283 (emphasis added).

144. 370 U.S. 421 (1962).

145. *See id.* at 424-25, 430.

146. Reporting on the sophistication of what it called the "TM Empire," the *Washington Post* noted that "[t]he TM organization comes complete with the organizational trappings of corporate America: computerized mailings, high-speed communications links, even a well-turned medical and life insurance plan for its employees." *TM's Corporate Look*, *supra* note 101, § A, at 1, col. 2.

The "TM Empire" now consists of no less than seven distinct organizations, all operating as agencies of the TM parent corporation, the World Plan Executive Council.

most ambitious of Mahesh's projects is the World Plan, which contemplates the establishment of 3600 TM centers worldwide.[147] The Plan's visionary goal is to bring about "enlightened consciousness" through the use of TM.[148] Mahesh believes that practitioners of the TM technique pass their peaceful feelings on to others and that one percent of the population, by practicing TM, could inaugurate a "phase transition from an age of distress and disharmony to an Age of Enlightenment."[149] Mahesh's groups began their foray into the educational field at least as early as 1972, when a TM program received approximately $20,000 in federal aid "to study the possible applications of SCI and TM in secondary education."[150] Coordinating the study was Maharishi International University (MIU). As early as 1973, MIU was able to report that "[p]ilot programs in SCI are being planned in several high school systems . . . and interest is steadily growing."[151]

TM organizations are thus highly visible groups whose avowed purpose is to promote the doctrine of SCI and the practice of TM. In

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Four of these organizations are directly involved in teaching TM and SCI to various groups throughout the country. *See* 1 ENCYCLOPEDIA OF ASSOCIATIONS 506 (12th ed. 1978). The American Foundation for the Science of Creative Intelligence (AFSCI), International Meditation Society (IMS), and Students International Meditation Society (SIMS), operate out of the country's 400 World Plan centers. AFSCI conducts symposia on SCI and offers courses in SCI and TM to business, professional, industrial, and governmental groups. IMS offers courses in SCI and TM to the general public. SIMS offers such programs, "both on and off campus, to high school and college students, faculty members, and to young people in general." *Id.* The fourth group, the Spiritual Regeneration Movement, offers courses in SCI and TM to individuals "interested in personal development in the context of a spiritual, holistic approach to knowledge." *Id.* In addition to these groups, there is the Institute for Social Rehabilitation (TM's outreach to prison and drug abuse institutions), *see* San Francisco Examiner, July 19, 1977, at 1, Maharishi International University (MIU) (named in honor of Mahesh and acting as TM's academic arm and training center), and the Maharishi European Research University (formed to investigate the "neurophysiology of enlightenment"), *see TM's Corporate Look, supra* note 101, § A, at 6, col. 1.

147. *See* 120 CONG. REC. 905 (1974) (remarks of Sen. Tunney).

148. The seven specific goals of the World Plan are to develop the full potential of the individual; to improve governmental achievements; to realize the highest ideal of education; to eliminate the age-old problem of crime and all behavior that brings unhappiness to the family of man; to maximize the intelligent use of the environment; to bring fulfillment to the economic aspirations of individuals and society; to achieve the spiritual goals of mankind in this generation.

1 ENCYCLOPEDIA OF ASSOCIATIONS 506 (12th ed. 1978).

149. H. BLOOMFIELD & R. KORY, *supra* note 100, at 348. "[T]he phenomenon of increasing social harmony occurring when one percent of a population begins the TM program has been called the *Maharishi Effect.*" *Id.* at 349.

150. Maharishi International University, General Information Sheet 2 (Summer 1973) (on file at MINNESOTA LAW REVIEW).

151. *Id.*

pursuit of this goal, the TM organizations are eager to secure governmental support. Mahesh has stated that

> transcendental deep meditation should be made available to the peoples through the agencies of government. It is not the time when any effort to perpetrate a new and useful ideology without the help of governments can succeed. . . .
>
> In view of the great benefits of transcendental deep meditation . . . it is highly useful that [it] be given to the people through the governmental agencies of health, education, social welfare, and justice. It should be a practice adopted by the medical profession, by teachers and professors in schools and colleges, by social workers working to improve the behavior of the people within a society, and for all the well wishers of life in every field.
>
> Thus, the proper plan for the emancipation of all mankind . . . lies in training evolved teachers of transcendental meditation . . . and finding various ways and means for its propagation according to the consciousness of the times.[152]

Given this commitment to the promotion of TM, it is hardly surprising that high school TM programs, although not yet common, have been started in various locations throughout the country.[153]

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152. TRANSCENDENTAL MEDITATION, *supra* note 95, at 300. Mahesh's statement is in accord with his proposal in a 1972 booklet entitled *An Address to Government:* " 'All that remains is for the innovative government official to satisfy himself that the technique of TM works as claimed, and take the appropriate steps to facilitate the implementation of (SCI) programs.' " Meyer, *'Solution to the Problems of Government,'* Washington Post, Sept. 22, 1975, § A, at 6, col. 5 (quoting MAHESH, AN ADDRESS TO GOVERNMENTS (1972)).

153. *See* Maharishi International University, General Information Sheet 2 (Summer 1973) (on file at MINNESOTA LAW REVIEW); *Transcendental Meditation Barred From Public Schools, supra* note 3, at 243. *See generally* H. BENSON, *supra* note 87, at 154 (TM programs introduced in selected high schools in Massachusetts and Michigan to study effects on drug use); R. KORY, *supra* note 100, at 84 (TM and SCI taught in Canadian public high school); Driscoll, *TM As a Secondary School Subject*, 54 PHI DELTA KAPPAN 236 (1972) (TM as an extracurricular high school activity in Eastchester, New York). Curricula guides and reports concerning high school TM courses are on file at MINNESOTA LAW REVIEW.

Organizational efforts have been made to systematize the introduction of such programs into American schools on curricular and extracurricular levels. Mahesh himself is reported to have "formulated a comprehensive syllabus for the teaching of SCI in junior and senior high schools," and many of the 130 teachers who attended a federally funded, month-long SCI teacher training course are reported to "have taught SCI at their schools . . . as an elective or extracurricular activity in conjunction with a course of instruction in the practice of TM provided by [Students International Meditation Society]," an official TM group. Rubottom, *Transcendental Meditation and Its Potential Use for Schools,* 36 SOC. EDUC. 851, 852 (1972).

A comprehensive SCI/TM curriculum was described by a TM instructor as follows:

> [T]he SCI course begins with instruction in the practice of TM, provided by SIMS. On the basis of experiential contact—the applied aspect of

The nature and activities of the TM organizations clearly increase the likelihood that a person initiated into TM will attach religious significance to it by developing belief in SCI. The organizations encourage those who have gone through the basic introductory course to undergo further training and study and to understand their practice of TM in light of the Science of Creative Intelligence.[154] Transcendental Meditation may be marketed as a wholly secular practice, but eventually the connection between it and SCI will become clear. At this point the person sold on TM may be willing to adopt the comprehensive philosophy of SCI as well.

Given the scope of SCI's subject matter, the dogmatic nature in which it is presented, the ritualistic manner in which its truths are realized, and the zeal with which its organizations promote it and seek to influence new practitioners, SCI qualifies as a religion for purposes of the establishment clause, because governmental promotion raises the reasonable likelihood that some individuals will take SCI to heart and treat it as a conventional believer would treat his own religious faith. It remains to examine the question whether any of the public school programs involving SCI and TM can withstand constitutional challenge.

III. THE REQUIREMENTS OF NO-ESTABLISHMENT

In *Everson v. Board of Education*,[155] the first Supreme Court opinion to interpret the establishment clause, the Court declared that the prohibition against establishment meant "at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[156] The Court thus enunciated a governmental duty of neutrality in matters respecting religion.[157]

> SCI—the students inductively analyze their experience with TM and in their lives to generate and substantiate fundamental premises that can be shown to have universal applicability. The connections drawn between all disciplines clarify the theoretical principles of SCI on a level which gives the notion of interdisciplinary studies a new relevance—familiarity based on direct experience with the source and goal of all knowledge . . . . The possibility of making education most effective in promoting individual evolution is now providing a uniquely unifying experience for many thousands of our youth.

Id.

154. *See* text accompanying note 118 *supra*.

155. 330 U.S. 1 (1947).

156. *Id.* at 15.

157. As interpreted by the Supreme Court, the policy imposed by the establishment clause is a substantial neutrality that allows for accommodation of the religious desires of the community, *see, e.g.*, Zorach v. Clauson, 343 U.S. 306, 313 (1952) (allowing students periodically to leave public school in order to attend religious in-

In the years since *Everson* the Court has indicated that the government satisfies this duty only if its actions have "a secular . . . purpose and a primary effect that neither advances nor inhibits religion"[158] and avoid "excessive government entanglement with religion."[159] In addition, two Justices have suggested that the government also violates the constitutional duty of neutrality when it either seeks an end that can only be accomplished through religious means,[160] or uses religious means when secular means would suffice.[161] Each of these four tests—purpose, effect, entanglement, and means—will be discussed in turn.

A. Clearly Secular Purpose

The government violates its duty of neutrality with respect to religion if it undertakes an activity for the purpose of advancing a particular religion or religion in general. When a court is presented with direct evidence of such a purpose, judicial inquiry need proceed no further; the state's action is unconstitutional. In *Epperson v. Arkansas*,[162] for instance, the Supreme Court was asked to pass on an Arkansas statute that forbade the teaching of the theory of evolution in public schools. The statute clearly appeared to favor one particular religious viewpoint, a cosmogony based on a literal reading of Genesis, and the evidence, which consisted largely of newspaper advertisements and letters, suggested that a "fundamentalist sectarian conviction . . . was the law's reason for existence."[163] Given such evidence and the absence of any "suggestion . . . that Arkansas' law [might] be justified by considerations of state policy other than the religious views of some of [the state's] citizens,"[164] the statute could not stand.

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struction) ("We are a religious people whose institutions presuppose a Supreme Being"), rather than a strict neutrality that allows no preferential treatment for religion as such, *see, e.g.*, P. Kurland, Religion and the Law 18 (1962) ("religion" may not be used as a classification for purposes of any governmental program). *See generally* Note, *supra* note 59, at 551-53 (describing "substantial neutrality" standard).

158. School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

159. Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). Just as absolute neutrality is not required, neither is total noninvolvement between governmental and religious institutions. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349 (1975) (upholding loan of auxiliary materials to parochial schools).

160. *See* School Dist. v. Schempp, 374 U.S. 203, 231, 280 (1963) (Brennan, J., concurring); McGowan v. Maryland, 366 U.S. 420, 466 (1961) (Frankfurter, J., separate opinion); notes 191 & 194 *infra* and accompanying text.

161. *See* School Dist. v. Schempp, 374 U.S. 203, 231, 280-81 (1963) (Brennan, J., concurring); McGowan v. Maryland, 366 U.S. 420, 466-67 (1961) (Frankfurter, J., separate opinion); text accompanying notes 192 & 195 *infra*.

162. 393 U.S. 97 (1968).

163. *Id.* at 108.

164. *Id.* at 107.

Generally, there will be no direct evidence of a religious purpose. This does not end the inquiry into legislative intent, however, for a program may be struck down as having an impermissible religious purpose even without proof of religious motivation in the legislative history. Religious purpose may be inferred when a program appears to promote religion and no clearly secular purpose can be shown to justify it.[165] In *School District v. Schempp,*[166] for instance, the Court struck down a public school program that required daily Bible reading without comment. The Court reasoned that even if "the Bible reading . . . was not 'strictly religious,' the place of the Bible as an instrument of religion cannot be gainsaid."[167] Thus, since the school authorities could demonstrate no clearly secular purpose for the Bible reading,[168] the purpose for mandating the performance of a practice intimately connected with religion was presumed to be religious.

The state can rebut the presumption of religious purpose that arises from religious appearance by demonstrating that a legitimate secular purpose is promoted by its actions. In *McGowan v. Maryland,*[169] for instance, the Court upheld a Sunday closing law even though the law seemed to encourage observance of the Christian day of rest. The Court found support for its conclusion that the law had a secular purpose in the fact that "proponents of Sunday legislation [were] no longer exclusively representatives of religious interests"[170] and in the specific secular benefits the law provided: "a general cessation of activity, a special atmosphere of tranquility, [and] a day which all members of the family or friends and relatives might spend together."[171] Thus, although the statute appeared to suggest state sponsorship of a particular religious practice, the state was able to convince the Court that its purpose was actually grounded in significant secular considerations.

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165. Justice Frankfurter suggested, in his separate opinion in McGowan v. Maryland, 366 U.S. 420 (1961), that while the courts were unable to discern the "private and unformulated influences which may work upon legislation," a law's motivation may be inferred from its "historical development." *Id.* at 469-70. But the search for a law's purpose does not end with its language or legislative history; the law's necessary operative effects themselves help to identify the purposes it serves. As Justice Frankfurter observed, "[t]o ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted." *Id.* at 466.

166. 374 U.S. 203 (1963).

167. *Id.* at 224.

168. The state's contention that the program had a secular purpose was rejected by the Court as inconsistent with the surrounding circumstances. *See id.*, note 235 *infra.*

169. 366 U.S. 420 (1961).

170. *Id.* at 435.

171. *Id.* at 451.

B. SECULAR PRIMARY EFFECT

Even when, as in *McGowan,* the state can demonstrate that a legitimate secular purpose is served by its actions, the program may nevertheless be invalid if its primary *effect* is either to advance or to inhibit religion.[172] In *Meek v. Pittenger,*[173] for example, the Supreme Court struck down a Pennsylvania statute that provided nonpublic elementary and secondary schools with loans of "instructional materials and equipment, useful to . . . education."[174] The Court held that, despite the "secular legislative purpose" behind the statute, the direct loan of such materials had "the unconstitutional primary effect" of advancing religion "because of the predominantly religious character of the schools benefiting from the Act."[175]

In *Committee for Public Education v. Nyquist,*[176] the Court used a similar approach to invalidate a New York statute that, *inter alia,* gave direct "maintenance" grants to nonpublic schools. The Court noted that "[n]o attempt [had been] made to restrict [the maintenance grants] to those expenditures . . . used exclusively for secular purposes"[177] nor " 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.' "[178] As a consequence, there was a danger that at least some of the state aid would be used to defray the costs of religious education, and the program was therefore invalid.

By contrast, in *Roemer v. Board of Public Works,*[179] the Court upheld a Maryland statute that provided public funds to four Catholic colleges. The Court accepted the trial court's finding that the colleges were "not 'so permeated by religion that the secular side cannot be separated from the sectarian.' "[180] Consequently, the statute's requirement that funds be used exclusively for nonsectarian purposes avoided any primary religious effect.[181]

The rule developed from *Meek, Nyquist,* and *Roemer* is that even when financial aid to an institution with a religious affiliation has a clearly secular purpose, the establishment clause is violated in the absence of safeguards to prevent the diversion of such aid to reli-

172. School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

173. 421 U.S. 349 (1975).

174. *Id.* at 354.

175. *Id.* at 363.

176. 413 U.S. 756 (1973).

177. *Id.* at 774. "Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel." *Id.*

178. *Id.* at 783, 790-91 (quoting Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)).

179. 426 U.S. 736 (1976).

180. *Id.* at 759 (quoting Roemer v. Board of Pub. Works, 387 F. Supp. 1282, 1293 (D. Md. 1974), *aff'd,* 426 U.S. 736 (1976).

181. *See id.*

gious use. Further, some recipient institutions may be so pervasively religious that any aid to them necessarily has the primary effect of advancing religion.[182] Accordingly, the state may not subsidize or promote activity that is in part secular and in part religious unless the secular and religious aspects of the activity can be readily separated and the state can ensure that it is directly supporting only the secular portion.

C. Avoidance of Excessive Entanglement

Although the purpose and primary effect of a program are both clearly secular, the program is still unconstitutional if it "entangles" the state, to an impermissible degree, in the administration of a religious institution. In *Lemon v. Kurtzman,*[183] the Supreme Court applied this principle to strike down a publicly funded salary supplement paid to parochial school teachers who taught only secular subjects. The evidence suggested that the teachers who received the salary supplement "did not inject religion into their secular classes,"[184] but the fact that the program did not actually foster religion did not redeem it, given its *potential* for doing so.[185] The Court recognized that

> a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. . . . What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.[186]

Thus, to ensure that no impermissible advancement of religion occurred, the state would have to subject the teacher to "comprehensive, discriminating, and continuing . . . surveillance."[187] This kind of surveillance, the Court concluded, would require the "exces-

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182. *See* Hunt v. McNair, 413 U.S. 734, 743 (1973):
> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

183. 403 U.S. 602 (1971).

184. *Id.* at 618.

185. *See id.* at 619.

186. *Id.* at 618-19.

187. *Id.* at 619. The Court in *Lemon* distinguished Board of Educ. v. Allen, 392 U.S. 236 (1968), which had upheld a publicly financed loan of textbooks to nonpublic schools on the ground that "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the [establishment clause]." 403 U.S. at 619.

sive and enduring entanglement between state and church" that the establishment clause was to prevent.[188]

In *Meek v. Pittenger*,[189] the Court used a similar analysis to strike down a program that provided nonpublic schools with certain auxiliary services,[190] even though the personnel involved were public employees who displayed no religious dedication and were subject to no religious discipline. The Court deemed dispositive, as it had in *Lemon*, the presence of a " 'potential for impermissible fostering of religion.' "[191] This potential existed because the auxiliary services were performed on church-related property, in "an atmosphere dedicated to the advancement of religious belief."[192] Because of this situation, the state was confronted with a constitutional dilemma: it had to " 'be certain, given the Religion Clauses, that subsidized teachers [did] not inculcate religion,' "[193] but "[t]he prophylactic contacts required to ensure that teachers play[ed] a strictly nonideological role [would] necessarily give rise to a constitutionally intolerable degree of entanglement between church and state."[194]

D. Least Religious Means

A program that passes scrutiny under the traditional purpose-effect-entanglement test is constitutionally valid even though it has secondary religious effects. In his separate opinion in *McGowan v. Maryland*,[195] however, Justice Frankfurter suggested that the state should also have the burden of showing that its goal cannot be reasonably achieved[196] through alternative means that minimize even the

188. 403 U.S. at 619. The *Lemon* Court noted that entanglement "in the broader sense" results when state and religious officials actively cooperate in a program that requires recurrent legislative approval. Such cooperation is particularly likely to breed political strife along religious lines. *See id.* at 622-23. Entanglement in the "broad sense" has never achieved the status of an independent criterion of establishment. Its strongest proponent has been Justice Brennan. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 256 (1977) (concurring and dissenting opinion); Meek v. Pittenger, 421 U.S. 349, 376-83 (1975) (dissenting opinion) (arguing that loans of auxiliary materials to parochial schools were unconstitutional on the broad entanglement ground, despite secular purpose, secular primary effect, and lack of *administrative* entanglement).

189. 421 U.S. 349 (1975).

190. The auxiliary services included vocational, academic, and psychological counseling; speech and hearing therapy; and special teaching for remedial students. *Id.* at 353.

191. *Id.* at 369 (quoting Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971)).

192. *Id.* at 371.

193. *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

194. *Id.* at 370.

195. 366 U.S. 420 (1961).

196. "Reasonably achieve" means that in terms of cost-effectiveness an available secular means is roughly equivalent to the "religious means" being challenged.

incidental promotion of religion.[197] After stating that ends attainable only as a derivative of promoting religion were beyond the power of the state to pursue,[198] Justice Frankfurter declared that "if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand."[199] Justice Brennan proposed a similar analysis in his concurrence in *School District v. Schempp*.[200] After stating that government could not use religion *qua* religion as a tool to promote secular ends,[201] he declared that the state may not use "religious means to serve secular ends where secular means would suffice."[202] Thus, both Justices Frankfurter and Brennan proposed a "least religious means" approach reminiscent of the least burdensome alternative test employed in free speech[203] and free exercise cases.[204]

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197. *See id.* at 466-67. One writer has proposed the following test: "Does the state have a compelling interest in declining alternative . . . measures involving no secondary religious effects?" Note, *supra* note 37, at 99. There, as here, the "least religious means" approach was offered as a supplement rather than as an alternative to the traditional purpose-effect-entanglement test. *See also* Galanter, *supra* note 67, at 280.

198. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state.

366 U.S. at 466.

199. *Id.* at 466-67.

200. 374 U.S. 203, 231, 280-81 (1963).

201. "To the extent that only *religious* materials will serve [an otherwise valid] purpose, it seems to me that the purpose as well as the means is so plainly religious that the exercise is necessarily forbidden by the Establishment Clause." *Id.* at 280 (emphasis in original).

202. *Id.* at 281.

203. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960) (statute requiring public school teachers to file annual list of organizational affiliations during previous five years was unconstitutional, since it infringed upon freedom of association and there were less restrictive means to achieve the state's goal of ensuring that teachers did not spend too much time on outside activities). *See generally* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

204. In Sherbert v. Verner, 374 U.S. 398 (1963), the Court held that the state could not deny unemployment benefits to a Seventh-day Adventist simply because she would not work on Saturday, the Sabbath day of her faith. *See id.* at 410. The Court, per Justice Brennan, held that even if the prevention of fraudulent claims constituted a "compelling interest" that justified uniform application of the law, "it would [still] be incumbent upon [the state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.* at 407. The Court distinguished Braunfeld v. Brown, 366 U.S. 599 (1961), in which it upheld a Sunday closing law as applied to Jewish businessmen who closed on Saturday for religious reasons. The *Verner* Court explained that in *Braunfeld* the "secular objective [of establishing a common day of rest] could be achieved . . . *only* by declaring

Although the Supreme Court has never explicitly endorsed a least religious means approach, it is compatible with the major establishment clause cases. In *School District v. Schempp,*[205] for instance, the school authorities attempted to justify Bible reading on the grounds that it helped to promote moral values, reverse materialistic trends, perpetuate institutions, and teach literature.[206] The Court chose to rebut these assertions of secular purposes by pointing to the Bible's religious nature and suggesting that, although there are secular purposes for Bible reading, its primary or basic purpose was religious.[207]

Justice Brennan's concurrence, however, appears to provide a sounder rationale for the Court's position by suggesting that the government's activity was invalid because it used an "essentially religious means to serve governmental ends where secular means would [have] suffice[d]."[208] The secular ends that the state sought to advance by the Bible reading could, Justice Brennan reasoned, be realized through such nonreligious activities as "readings from the speeches and messages of great Americans . . . or from documents

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Sunday to be that day of rest." 374 U.S. at 408 (emphasis added). Exempting Sabbatarians "would have rendered the entire statutory scheme unworkable." *Id.* at 409. In *Verner,* however, no comparable justifications for uniform application of the law were apparent.

A close parallel exists between the least burdensome alternative and traditional equal protection analyses. Generally speaking, the equal protection clause forbids all differential treatment that impinges on "fundamental interests" or that is based on "suspect classifications," unless such differential treatment is necessary to promote a compelling interest. *See, e.g.,* Loving v. Virginia, 388 U.S. 1, 11 (1967) (racial classification restricting right to marry invalid as unnecessary to "accomplishment of [any] permissible state objective"). Absent a fundamental interest or a suspect classification, the equal protection clause requires only that the classification bear some rational relationship to a legitimate state end. *See Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1076-132 (1969).

Since state action that even indirectly promotes a religion may impinge on the fundamental right to "no-establishment," such action is valid only to the extent that it is truly necessary to the promotion of a compelling secular interest. This is but another way of saying the state must select a less religious alternative if one is available. *Cf.* Walz v. Tax Comm'n, 397 U.S. 664, 696-97 (1970) (Harlan, J., concurring) (endorsing "an equal protection mode of analysis" in determining whether the state had observed its duty of neutrality with respect to religion).

205. 374 U.S. 203 (1963).

206. *See id.* at 223.

207. *See id.* at 224; *cf.* DeSpain v. DeKalb County Community School Dist. 428, 384 F.2d 836, 839 (7th Cir. 1967) ("the test laid down . . . in *Schempp* [applied] to the facts of this case convinces us that the . . . 'secular purposes' of the verse were merely adjunctive and supplemental to its basic and primary purpose, which was [a] religious act"), *cert. denied,* 390 U.S. 906 (1968). A more coherent standard, it is submitted, is whether the state's promotion of a religious practice is reasonably necessary to its secular end.

208. 374 U.S. at 231.

of our heritage of liberty."[209] Those ends that were not obtainable by such secular means—that is, those that depended on an "immediately religious experience shared by the participating children"—were simply beyond the power of the state to seek.[210] Thus, there was no legitimate governmental end that could not reasonably be achieved through less religious means.

In contrast to cases like *Schempp,* there may be some situations in which a permissible state interest may be promoted only through a method that also advances religion. The facts of *Everson v. Board of Education*[211] provide an example of just such a case. In *Everson,* the Court held that a public bus subsidy given to school children did not violate the state's duty of neutrality with respect to religion, even though an incidental effect of the program was to subsidize religious education.[212] A least religious means approach might well have produced the same result, for there was no less religious means whereby the state could reasonably achieve its admittedly legitimate goal of encouraging safety in school transportation. Limiting the program to public school children would have frustrated the state's purpose in promoting the safety of *all* school children. Tying the subsidy to a requirement that all students attend public schools would have been even less reasonable, both economically and constitutionally.[213]

In *McGowan v. Maryland,*[214] the Supreme Court was presented with an argument based squarely on the least religious means test. The parties challenging Maryland's Sunday closing law argued that the state's interest in a weekly day of rest should be promoted only by a means that did not encourage church attendance or require community observance of the Christian Sabbath.[215] The Court did not reject this argument,[216] but responded, in effect, that there was no less religious alternative that would reasonably vindicate the state's legitimate interest in a common day of rest. The state could reasonably choose Sunday closing as the best means available since, as a matter of custom, most people already regarded Sunday as the

209. *Id.* at 281.

210. *Id.* at 279.

211. 330 U.S. 1 (1947).

212. *See id.* at 17-18.

213. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state may not force parents to have children instructed by public school teachers only).

214. 366 U.S. 420 (1961).

215. *See id.* at 449-50; *cf.* Mandel v. Hodge, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976) (invalidating Governor's order to close state offices for three hours on Good Friday because this encouraged employees to worship if they were so inclined).

216. Neither, however, did the Court accept the argument. "[A] majority of the Court has never employed the 'alternative means' rationale in an establishment clause case." Choper, *Aid to Parochial Schools,* 56 CALIF. L. REV. 260, 309 n.330 (1968).

appropriate time for family and recreational activities.[217] The least religious means test was satisfied because neither of the other two choices—allowing individuals to choose their own day of rest, or closing businesses on a common day other than Sunday—would serve the desired secular purpose as effectively.[218] The former would wholly frustrate the state's interest in a common day of rest, and the latter would disrupt established custom and perhaps be "ill-designed to secure the desirable community repose for which Sunday legislation is designed."[219]

Thus, purpose, primary effect, entanglement, and least religious means represent the standards by which any governmental activity should be judged when challenged as an establishment of religion. The next section will apply these standards to several hypothetical public school programs involving SCI and TM.

IV. TRANSCENDENTAL MEDITATION IN THE PUBLIC SCHOOLS

Unhappily, for purposes of tidy analysis, TM programs in the public schools do not assume a standard form. SCI and TM may be taught separately, or together. TM lessons for students may be paid for by the students or the state. SCI and TM may receive special treatment in a course reserved to themselves, or appear in a course devoted to philosophy or meditation generally. One or both may be taught by a regularly certified public school teacher, or by a TM instructor brought in especially for that purpose. Each of these variations has distinct constitutional implications. The only common feature of the hypothetical situations discussed below is that they all involve some form of SCI/TM program sponsored by a public primary or secondary school.

A. A Course in SCI Alone

If SCI is an establishment clause religion, a public school course devoted entirely to SCI, even if taught objectively, would appear to violate the Constitution. By offering a course in SCI, but not a comparable course in, say, Judeo-Christian philosophy, the state would impermissibly favor SCI and thus violate its duty to remain neutral among religions.[220] In such a situation the inability of the state to offer

217. *See* 366 U.S. at 450-52.

218. *See id.* at 506 (Frankfurter, J., separate opinion).

219. *Id.* at 507 (Frankfurter, J., separate opinion). "It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord." *Id.* at 452 (majority opinion).

220. As the Supreme Court stated in Epperson v. Arkansas, 393 U.S. 97 (1968),

any secular purpose to justify teaching SCI but not other religions would leave the court with no alternative but to presume that the purpose is religious.[221]

The possibility of preferential treatment is diminished if SCI is taught in a comparative religion or philosophy course. In this situation, the high school administrator may easily maintain that the school's curriculum, as a whole, is neutral among religions. Moreover, as several Supreme Court Justices have indicated, religion is a subject worthy of objective study.[222] Thus, the course may be said to

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"[t]he State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion . . . . This prohibition is absolute. It forbids alike *the preference of a religious doctrine* or the prohibition of theory which is deemed antagonistic to a particular dogma." *Id.* at 106-07 (emphasis added). While *Epperson* involved a *prohibition* of a particular subject, the quoted dictum indicates that the state's *prescription* of a particular subject may be equally invalid under the establishment clause.

In Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975), the Sixth Circuit Court of Appeals struck down a statute that required public school textbooks containing theories of human origins to give each account of creation, including the Genesis account, equal attention. The statute further provided that all such textbooks must disclaim that the theories being taught were "represented to be scientific fact." The Bible, however, was not to be defined as a "textbook" and was not required to contain the disclaimer. The statute also expressly excluded from its "equal time" provisions any "satanical beliefs of human origin." *Id.* at 487. In striking down the statute, the court ruled, in part, that "preferential treatment of the Bible clearly offends the Establishment Clause." *Id.* at 491.

In a similar case, Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954), the New Jersey Supreme Court enjoined a Bible distribution program cosponsored by the school board and the Gideon Society, an evangelistic group associated primarily with the free placement of Bibles in places of public accommodation. Under the proposed program, the school would have distributed a Bible to each child who expressed interest by bringing a slip signed by his parent. The court held that the active role of the school in the distribution program constituted a "preference of one religion over another" and was therefore unconstitutional. *Id.* at 51-52, 100 A.2d at 868.

221. The state could, in theory, eliminate problems of undue preference among religions by offering separate courses in each of several religious doctrines. But it might have difficulty demonstrating that a clearly secular purpose is served by such separate courses that is not served by a single course in comparative religion.

222. Justice Jackson, for example, concurring in Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), observed,

> The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

Id. at 236; *see* School Dist. v. Schempp, 374 U.S. 203, 225 (1963) (Bible worthy of study for its literary and historical qualities); *id.* at 300 (Brennan, J., concurring) (impossible

advance a secular objective.

Moreover, "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not *directly* and *sharply* implicate basic constitutional values."[223] Where school officials have concluded that, in their professional judgment, SCI may properly be examined within the context of a comparative study of religions or philosophies, a presumption of constitutionality should operate, and the courts should not intervene absent a showing that SCI is being taught in a dogmatic manner. Only when such a course clearly favors SCI at the expense of other equally available explanations of the universe would establishment problems arise.

B. A Course in SCI and TM

While teaching about SCI is probably constitutional in the context of a comparative religion or philosophy course, its use as an aid to the instruction of TM is clearly invalid.[224] To justify teaching TM in the public schools, the state would have to show that TM is demonstrably effective in producing various psychological and physiological effects; that these effects are closely related to improved academic performance or some other educational goal; and that the state, in pursuit of its legitimate interest in improved academic performance, may therefore teach TM in order to foster such effects. To justify the teaching of SCI, the state would have to argue further that TM is most effective when its practitioners are able to analyze and appreciate their meditative experience in terms of its intellectual and philosophical underpinnings. Thus, to enhance the educational goals achieved through TM, the state should be allowed to teach SCI.

This justification for teaching SCI cannot withstand scrutiny. The state's effort to enhance the effectiveness of TM by providing what amounts to a religious explanation of its physical effects inevitably results in a promotion of SCI. Although a program fostering positive student attitudes is generally legitimate, it is unconstitutional where its direct effect is to promote religion.[225] If the only way

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to teach social sciences or the humanities meaningfully without some mention of religion); *id.* at 306 (Goldberg, J., concurring) (teaching *about* religion in public schools permissible, but teaching *of* religion impermissible).

223. Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (emphasis added).

224. This was the sort of program declared unconstitutional in Malnak v. Mahesh, 440 F. Supp. 1284 (D.N.J. 1977), *appeal docketed,* Nos. 78-1568, 78-1569 (3d Cir. May 11, 1978).

225. *See* notes 169-75 *supra* and accompanying text. In Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), the Court found an impermissible promotion of religion where students were released from regular classes to receive religious instruction from Protestant, Catholic, and Jewish teachers, all of whom were allowed to

to enhance the effectiveness of TM is to explain it in terms of SCI, the state must satisfy itself with less than maximum effectiveness.[226]

C. A COURSE IN TM ALONE

While the teaching of SCI either alone or with TM strongly suggests an improper religious purpose, a program featuring TM alone[227]

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use rooms within the school building. That the *McCollum* program could claim "educational" and "social" benefits, *see id.* at 228 n.20 (Frankfurter, J., separate opinion), did not save it since these benefits derived from religious instruction.

There are three superficial differences between the *McCollum* situation and an SCI/TM course in the public schools. First, since *McCollum* concerned a program involving religious teachers unassociated with the school, its holding is directly analogous only to an SCI/TM course that is taught by a TM instructor brought in especially to teach the course. The same course taught by a regular public school teacher presents a different situation. The Court has indicated, however, that the religious affiliation of the teacher is not a controlling factor when the atmosphere in which he works is permeated with religion. *See* Meek v. Pittenger, 421 U.S. 349, 371-72 (1975) (that auxiliary staff were themselves religiously neutral did not save a program under which the state donated their services to parochial schools). A course teaching SCI as a means to evaluate TM could create such an atmosphere.

Second, *McCollum* involved "close cooperation between the school authorities and religious [officials] in promoting religious education." 333 U.S. at 209. Although a course taught by instructors closely associated with TM organizations would present exactly this sort of close involvement, such problems could be alleviated by using unaffiliated instructors (if such exist). Nevertheless, the teaching materials would almost certainly be provided by some official TM source, and the TM course, unlike the classes challenged in *McCollum,* would be a regular part of the curriculum. These factors would appear to create as much church-state involvement as did the facts in *McCollum.*

Third, *McCollum* involved indirect coercion, as students were compelled to attend school and were subject to social pressures to attend the in-school religious instruction, whereas the SCI/TM program in question is an elective course that no one, presumably, would be pressured into taking. Despite its elective nature, however, it is not clear that a TM course would be devoid of social pressures to conform. Even if it were, *McCollum* cannot be distinguished on this basis, because the absence of coercion will not preclude a finding that the establishment clause has been violated. *See* Engel v. Vitale, 370 U.S. 421, 430 (1963).

More significant than these differences between *McCollum* and an SCI/TM program, however, is the basic similarity: "the State's tax-supported public school buildings [are] used for the dissemination of religious doctrines," Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948), and religious teaching is invested with "all the symbols of authority" at the command of the regular school teacher, School Dist. v. Schempp, 374 U.S. 203, 262-63 (1963) (Brennan, J., concurring); *cf.* Resnick v. East Brunswick Township Bd. of Educ., 135 N.J. Super. 257, 343 A.2d 127 (Ch. Div. 1975) (invalidating lease whereby Sunday schools and Hebrew schools in need of a building leased public school facilities at cost and below fair rental value), *rev'd,* 77 N.J. 88, 398 A.2d 944 (1978).

226. *See* notes 198 & 201 *supra.*

227. The textual discussion concerns a TM course in the high school curriculum. With respect to an extracurricular TM program, different considerations would apply. A high school policy that favored TM by allowing "TM clubs" while disallowing other

presents a closer constitutional question. A program that concentrates solely on producing the beneficial physiological effects of TM is unlikely to involve any direct evidence of a religious purpose, for TM's supporters, in contrast to those supporting the anti-evolution statute in *Epperson,*[228] can and usually do justify the practice of TM in exclusively nonreligious terms.[229] Moreover, the widespread recognition of TM's secular benefits[230] will allow the state to advance a clearly secular justification for a TM program. That being the case, the state's purpose will appear genuinely secular.

It can be argued, however, that because TM, like Bible reading, is a symbolic trapping of a particular religious faith, its use in the public schools is absolutely prohibited by *Schempp.*[231] Under this reading of *Schempp,* once it is shown that a public school has associated itself with such a trapping, the establishment clause inquiry is at an end.[232] The rebuttal to this argument is that, while TM may

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religious clubs would be constitutionally suspect. *See* Driscoll, *supra* note 153 (account of program in Eastchester, New York, that allowed TM teachers to promote TM on school grounds and involved use of high school building for extracurricular TM programs). A high school policy that enabled *all* bona fide student groups to use high school facilities, however, would presumably have a valid purpose and do nothing more than "provide an opportunity for the voluntary expression of religious belief." School Dist. v. Schempp, 374 U.S. 203, 318 (1963) (Stewart, J., dissenting). *But see* Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 13-14, 137 Cal. Rptr. 43, 50 (allowing student Bible study club to operate on public high school campus not constitutionally permissible because it would "place school support and sponsorship behind the religious objectives of the club" and "would foster excessive state entanglement with religion"), *cert. denied,* 434 U.S. 877 (1977).

228. *See* text accompanying notes 162-64 *supra.*

229. *See* note 100 *supra.* If, on the other hand, a TM program were sold to a school board on the basis that it would enlighten consciousness, reveal the truth of the teachings of the Hindu masters, or bring the students closer to the ultimate reality of the universe, the state's motivation would be suspect.

It might be argued that the constitutional status of a program should not depend upon the language used by its proponents. But *Epperson* may be read to mean that the anti-evolution law there in question might have been ruled constitutional had it been passed with the stated intent of removing unusually controversial yet nonessential subjects from the public schools. *See* Epperson v. Arkansas, 393 U.S. 97, 112-13 (1968) (Black, J., concurring). Under this reading, the constitutionality of a program could indeed depend on the language used by its supporters.

230. *See* note 87 *supra* and accompanying text.

231. *See* notes 165-68 *supra* and accompanying text.

232. Justice Rutledge, dissenting in Everson v. Board of Educ., 330 U.S. 1 (1947), stated this view in the extreme: "[C]ourts [may] sustain appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or *observances,* be the amount large or small." *Id.* at 53 (emphasis added). For a similar opinion, see Engel v. Vitale, 370 U.S. 421, 439-42 (1962) (Douglas, J., concurring). It may be said that while this principle is subject to some qualification, *see, e.g.,* School Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) (invocational prayers in legislative chambers probably constitutional since legislators

reflect a religious world view, it does not necessarily promote one.[233] To some extent, TM can be separated from the religion with which it is identified, and its secular benefits are at least arguably independent of any connection with SCI.[234] If such a separation is achieved and if the program is designed exclusively to serve such legitimate secular ends as reducing tension, reducing drug dependency, and enhancing mental capabilities, there is a respectable argument[235] that an elective program[236] in TM should not be struck down as having an

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are presumably mature adults who may easily absent themselves), it applies with full force in the public schools. *See generally* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., separate opinion).

233. *Cf.* Curran v. Lee, 484 F.2d 1348, 1350 (2d Cir. 1973) (upholding municipal support of a Saint Patrick's Day parade and noting that, although "[t]he practice of honoring St. Patrick may be rooted in religious belief, . . . a parade named after him is not necessarily a religious procession"); Allen v. Morton, 333 F. Supp. 1088, 1094 (D.D.C. 1971) (upholding governmental aid to Christmas Pageant of Peace, which involved construction, display, and maintenance of a life-sized crèche and display of plaques explaining the pageant's secular history and purpose, since public welfare justified promotion of certain holidays even with "strictly religious origins," and "it is only natural that some of the original religious traditions should carry over in the observance"), *rev'd per curiam on other grounds*, 495 F.2d 65 (D.C. Cir. 1973).

234. *See* note 130 *supra* and accompanying text.

235. It is not clear that even the existence of a legitimate secular purpose will save a program involving a religious practice in the public schools. In School Dist. v. Schempp, 374 U.S. 203 (1963), for instance, the state attempted to justify its Bible reading program as an effort to promote various secular civic values, *see id.* at 223-24, but the Court, in effect, dismissed this contention.

> Included within [the program's] secular purposes, [the state] says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. . . . [E]ven if [the program's] purpose is not strictly religious, it is sought to be accomplished through readings . . . from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version [and] the . . . amendment permitting nonattendance . . . . None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

Id. This portion of the opinion can be read two ways. First, it might be said that, since ceremonial Bible reading is potentially a religious practice, any promotion of it by the state indicates an impermissible religious purpose. The better reading, however, would be that, given the totality of the circumstances, the Court simply did not believe that the state's purpose was secular. If this is in fact the appropriate reading, then a program of TM instruction is clearly distinguishable on the basis of its undisputed utility in achieving various legitimate secular objectives. If, however, the former reading is correct, it would appear that a course of instruction in TM, which is as much "an instrument of" SCI as Bible reading is an instrument of the Christian religion, violates the establishment clause as interpreted in *Schempp*.

236. Since TM reflects SCI and potentially promotes it, any element of coercion with respect to a TM program would, given the precedents of Illinios *ex rel.* McCollum

impermissible *purpose.*[237]

Even if a TM program has a secular purpose, however, it will nevertheless be invalid if its primary effect is advancement of SCI. Suppose, for instance, that a school offers a course featuring practice in TM and subsidizes the cost of lessons.[238] In such a case, the state would be directly financing an organization that has as a primary objective the promotion of an establishment clause religion. The establishment clause cases teach that such support is constitutionally permissible only to the extent that it is used solely for the organization's secular operations.[239] Without regard to the issue whether TM itself is truely a secular activity, it is clear that some of the state money would be used for activities of the TM organizations in their worldwide missions.[240] Moreover, even if the lessons were given at cost, the state would be required to ensure that the religious and secular aspects of TM were kept cleanly separate and the former

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v. Board of Educ., 333 U.S. 203 (1948), *discussed at* note 225 *supra,* and School Dist. v. Schempp, 374 U.S. 203 (1963), substantially strengthen the argument that the program is unconstitutional per se. *See, e.g., id.* at 288-93 (Brennan, J., concurring) (religious exercise conducted during school hours involving all students invalid even if students allowed to absent themselves, because of "psychological compulsion to participate"). One might also read West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (student cannot be compelled to engage in act he regards as religious worship), together with Torcaso v. Watkins, 367 U.S. 488 (1961) (state cannot use religious oath because it violates conscience of nontheists), to mean that a compulsory TM program would be invalid on free exercise grounds.

237. It was apparently not the use of the Bible per se, but the failure of school authorities to present the Bible in a secular context, that was fatal to the school Bible reading in *School Dist. v. Schempp:*

> It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises . . . .

374 U.S. at 225.

One obvious practical difference between the program involved in *Schempp* and the hypothetical program involving TM is the degree to which the underlying religions have popular followings. Given SCI's distinctly minority position among American religious beliefs, a court would undoubtedly be skeptical of a claim that the purpose of a program involving TM was to promote a belief in SCI. This may, of course, be the *effect* of the program, but as an intuitive matter it is doubtful that the *purpose* can reasonably be said to be religious.

238. It appears that in a model SCI/TM course the students receive TM lessons before the course from the Students International Meditation Society. *See* Rubottom, *supra* note 153.

239. *See* notes 177-82 *supra* and accompanying text.

240. According to a *Washington Post* account, the "TM Empire," *see* note 146 *supra,* operates almost entirely on the course fees it charges. *See TM's Corporate Look, supra* note 101, § A, at 1, col. 1.

wholly excluded from the lessons for which it paid.[241] It is not clear whether the TM organizations are able to make such a separation since TM and SCI permeate and reinforce each other.[242] Even if theoretically possible, however, the degree of state supervision required to ensure that the separation was maintained would raise insurmountable entanglement problems.[243]

State subsidization of TM lessons for students would thus be impermissible; but eliminating the subsidy will not eliminate the constitutional difficulties. Any course that involves instruction by a person affiliated with a TM organization creates a danger of indoctrination in SCI. All regular TM instructors have either attended Maharishi International University or participated in a special three-to-six month teacher training program. Indeed, most have received training from Mahesh himself.[244] Of more significance, the instructor has been taught that TM will be of personal and perhaps religious benefit to everyone and is expected to promote its propagation.[245] The TM instructor is thus being asked to teach a subject that is an integral part of a belief-system with which he is aligned and to the spread of which he is committed. "With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine."[246] A TM course taught by a TM instructor

241. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); notes 177-82 *supra* and accompanying text.

242. TM organizations, therefore, are more easily analogized to the church-affiliated elementary or secondary schools whose religious mission pervades all aspects of their programs than to church-affiliated institutions of higher education that make efforts to separate their religious and secular operations. *See generally* Hunt v. McNair, 413 U.S. 734, 743 (1976).

243. *See* Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

244. *See* H. BLOOMFIELD & R. KORY, *supra* note 100, at 153-55.

245. According to two accounts, each TM instructor signs a contract with Mahesh that concludes, "I have been accepted to serve the Holy Tradition and spread the light of God to all those who need it." J. BJORNSTAD, *supra* note 3, at 29; Johnson, *A Court Challenge to TM,* 93 CHRISTIAN CENTURY 300, 301 (1976). Mahesh himself lends credence to such accounts in his *Transcendental Meditation:*

> If all those to whom such information comes through this book would inform their neighbors . . . that there is a way to improve the consciousness of the individual . . . for his own benefit, and for that of all creation, it would be a great help to humanity. There is a very great responsibility on every individual.

TRANSCENDENTAL MEDITATION, *supra* note 95, at 73. In addition, new meditators have received a newsletter stating, "The full possibilities of TM in terms of rejuvenating society will only be realized when the individual meditators participate more actively in stimulating the growth of the movement." *It's Meditation Time, supra* note 101, § A, at 8, col. 6.

246. Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971); *cf.* Wolman v. Walter, 433 U.S. 229 (1977) (holding invalid state subsidies of bus transportation for nonpublic school "field trips"). The Court in *Wolman* noted that it was not only the location but also

may thus have to be monitored constantly to remove the danger of subtle indoctrination. Since the course is being taught within a public school, such surveillance would not raise constitutional problems of administrative entanglement,[247] but the practical difficulties involved would make it almost impossible for the state to ensure that " 'subsidized teachers do not inculcate religion.' "[248] Unless the TM instructor teaches in a religiously neutral manner, however, the state will clearly be promoting religion in contravention of the establishment clause.

From the foregoing, it appears that the only program of TM instruction that might withstand an establishment clause challenge is one where any reference to SCI has been eliminated, where the state is uninvolved in the aquisition of the technique, and where an instructor unaffiliated with any of the TM organizations is used. The only difference between such a course and one in meditation generally is the insistence of the former on a particular technique. The question, therefore, is whether that insistence is permissible under the establishment clause.

It is clear that the necessary effect of a program devoted exclusively to TM will be the promotion of SCI. One can hardly practice TM without learning of its underlying theory. Once that connection is made, every experience with TM is an opportunity, an invitation, to test and explore the explanation offered by SCI. Conceptually, the two are symbiotic: just as SCI explains and encourages TM, TM makes the tenents of SCI more practical and compelling. Indeed, the more personally rewarding the meditator finds TM, the more compelling may seem the underlying theory.[249] Thus, a program that sanc-

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> the individual teacher who makes a field trip meaningful. The experience begins with the study and discussion of the place to be visited; it continues on location with the teacher pointing out items of interest and stimulating the imagination; and it ends with a discussion of the experience . . . . [W]here the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct.

Id. at 253-54.

Even if he is not committed to promoting SCI, an instructor has a constitutional right to express his own views in response to student inquiries, especially when these inquiries relate to the subject matter of the course. *See, e.g.*, Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037 (W.D.N.C. 1973) (teacher may not be penalized for explaining his agnostic beliefs in response to questions by students).

247. *Cf.* Lemon v. Kurtzman, 403 U.S. 602, 617-20 (1971) (surveillance of a religious institution held to constitute an impermissible entanglement with religion). Such surveillance might, however, raise an issue of entanglement "in the broad sense." *See* note 188 *supra.*

248. Meek v. Pittenger, 421 U.S. 349, 369 (1975) (quoting Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)).

249. This power to induce belief makes TM akin to the symbolic trappings of conventional religious faith. *See* notes 72-74 *supra* and accompanying text.

tions and encourages the practice of TM, even in a manner wholly devoid of any overt reference to SCI, inevitably has a tendency to induce and confirm acceptance of SCI. That many or most meditators attach no religious meaning to the experiences provided by TM does not ensure that some will not.[250] Where such potential exists in a state-sponsored program, the establishment implications are substantial.

Whether such potential effects are sufficient, without more, to render the program unconstitutional is problematic. Under the traditional purpose-effect-entanglement test, the answer will depend on whether the effects should be classified as primary or secondary. The Supreme Court, however, has offered little guidance for making that distinction. Indeed, it appears to be inherently unmanageable.

Under the least religious means test, the outcome is clearer, for there do appear to be secular alternatives by which the state could achieve its goals. Dr. Herbert Benson, one of the first to study TM scientifically,[251] has also investigated other meditation techniques and has concluded that "the various physiologic changes that accompan[y] Transcendental Meditation . . . [are] *in no way unique to Transcendental Meditation*" or to prayer.[252] Rather, it appears that *various* techniques can elicit what he calls "the Relaxation Response." These techniques are said to share with TM four basic elements: a quiet environment, a mental device, a passive attitude, and a comfortable position.[253] Although religious elements may be present, they are not necessary to produce the secular benefits of meditation. In fact, Benson suggests a simple technique, involving the silent repetition of the word "one," which he claims will produce effects similar to those produced by TM.[254]

If Dr. Benson is correct, a least religious means analysis dictates that TM not be encouraged by the public schools since secular means that are reasonable and effective are available to accomplish the state's educational interest in relieving stress and improving mental attitudes. Although public schools may offer general meditation programs, unaffiliated with religious traditions,[255] they may not select a

250. *See* text accompanying notes 135-37 *supra.*

251. *See* note 87 *supra.*

252. H. BENSON, *supra* note 87, at 95, 161 (emphasis in original).

253. *See id.* at 159-61.

254. *See id.* at 162-63. The *New York Times* referred to Benson's technique as "a demystified version of transcendental meditation or a secularized version of prayer." N.Y. Times, Sept. 11, 1975, at 25, col. 1.

255. *See generally* Opinion of the Justices, 113 N.H. 297, 307 A.2d 558 (1973) (advisory opinion) (state may pass statute providing time for voluntary silent meditation in the public schools); CONN. GEN. STAT. ANN. § 10-16a (West 1977) ("[Each] board of education . . . shall provide opportunity at the start of each school day to

religiously based technique where secular means exist that will accomplish the same purpose.

But even this does not resolve the issue entirely, for those affiliated with various TM organizations have challenged the significance of Dr. Benson's research[256] and the validity of his conclusions.[257] To the extent that these challenges have merit, TM may indeed be uniquely effective as an educational tool. If that were to be proved, the question under the least religious means test would be whether the state's interest in achieving the incrementally greater benefit provided by TM sufficiently outweighs the dangers the practice presents for promoting religion.

While a definitive answer appears impossible, there is a substantial argument that the state's interests do not outweigh the dangers. First, while it is unclear what might account for TM's special efficacy, several of the elements that distinguish it from techniques such as Dr. Benson's may be duplicated by the state. To the extent that the financial investment made in TM lessons, the psychological boost provided by the puja, experienced and trained instructors, and group support account for some of TM's unique effectiveness,[258] the state should be able to produce at least some of the same benefits through its own efforts.[259] If such state-created alternatives are reasonably effective substitutes, it would appear that the least religious means test mandates their use.[260] On the other hand, some of the elements that distinguish TM—its underlying cosmology, the mantras, its puja, and the unique ability of its instructors to impart a personalized mantra—cannot be duplicated by the state. Yet these are some of the very elements that tend to enhance the likelihood that a participant

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allow those students and teachers who wish to do so, the opportunity to observe such time in silent meditation.").

256. *See* M. EBON, *supra* note 101, at 38, 55 (TM official notes that Benson considered only oxygen consumption, in contrast to the earlier Benson-Wallace studies, which had used a number of physiological criteria).

257. *See* H. BLOOMFIELD & R. KORY, *supra* note 100, at 89-94 (studies show that TM produces significantly lower oxygen consumption rates than does Benson's method and that TM's time-tested mantras are safe, whereas Benson's suggestion of using the sound "one" may lead to harm in the long-run).

258. *See generally* M. EBON, *supra* note 101, at 50, 58, 108, 140.

259. The state could, for example, require that the students make some form of financial commitment to the program if that would improve its efficacy. Similarly, the state could formulate its own initiation ceremony, attempt to create an atmosphere of mutual support within the classroom, and, to some extent at least, train its own teachers. Of course, such measures will at most provide only a partial substitute for their counterparts within TM. Nevertheless, they do indicate that the state is not powerless to duplicate at least some of the factors that may account for TM's unique effectiveness.

260. *See* notes 195-204 *supra* and accompanying text.

in the program will develop a religious belief in SCI/TM.[261] If it is these elements that underlie TM's effectiveness, achieving that effectiveness is simply beyond the power of the state, for benefits obtainable only by promoting religion represent impermissible goals.[262] Once these two sets of elements are removed, it is not clear whether there is anything to distinguish TM from Dr. Benson's technique.

A second major reason for arguing that even a course in TM alone should be held to be an establishment is the de minimis effect such a holding would have on the state's interests. Even if TM is more effective than other forms of meditation, it is clear that the difference is incremental and probably of little practical import. Arrayed against the interest in this incremental educational benefit is the substantial danger of inducing religious belief that necessarily accompanies any state program that sanctions and encourages the practice of TM. While it would be dogmatic to insist that any danger of promoting religion would invalidate the program regardless of the state's interests, at some point the state must be satisfied with achieving something less than it might if it could act without regard to the constitutional consequences. Because there appear to be secular methods by which the state could achieve much that it might hope to accomplish through TM, it appears that such a point has been reached.

V. CONCLUSION

As one commentator has said, a sense of "intuitively felt equity" demands that courts "extend [the] establishment prohibitions to groups who do not claim to be transcendental but who tend to be generally thought of as being religious or spiritual. The criteria for being so regarded must remain mysterious."[263] This Note has attempted to explicate these mysterious criteria, suggesting two levels of inquiry: whether the belief-system with which the state is involved is reasonably capable of supporting religious belief and whether, given state support, there is an unacceptable likelihood that some participants will develop a religious belief. At the first level, the inquiry is governed by the question whether the belief-system is comprehensive to a degree roughly analogous to conventional faiths. At the second level, the inquiry is governed by the belief-system's degree of comprehensiveness, the degree to which it lays claim to ultimate truth, the degree to which it is supported and identified by symbolic

261. *See* notes 101-15 & 120-45 *supra* and accompanying text.

262. *See* notes 198 & 201 *supra*. *See generally* Dixon, *Religion, Schools, and the Open Society: A Socio-Constitutional Issue*, 13 J. PUB. L. 267 (1964).

263. Hollingsworth, *Constitutional Religious Protection: Antiquated Oddity or Vital Reality?*, 34 OHIO ST. L.J. 15, 112 (1973).

trappings, and the degree to which it is associated with and promoted by a visible, organized group.

Under this analysis, SCI clearly qualifies as an establishment clause religion. First, SCI offers a suprarational explanation of the universe and the individual's role within it that is no less comprehensive than, and indeed is very similar to, that offered by many of the world's conventional faiths. Second, SCI lays claim to ultimate truth, through the words of its principal exponent, through the use of mythology, and through a transcendental experience that is said to authenticate its principles. Third, SCI has various trappings, principally the puja and TM itself, that not only resemble traditional religious ritual but may also be functionally religious for some people. Finally, SCI and TM are associated with well organized and highly visible groups, whose avowed purpose is to promote SCI/TM worldwide, both privately and through the use of governmental agencies.

Given the existence of these attributes, the promotion of SCI/TM by the government threatens to undermine the principal value that the establishment clause is designed to serve: freedom of religious choice. As a consequence, SCI must be classified as an establishment clause religion, and its permissible place in public schools, if any there be, is almost certainly limited to a course in comparative religion or philosophy.

For a program teaching TM alone, the constitutional outcome is not so clear. While a legitimate secular purpose may reasonably be advanced to justify such a program, there remain significant problems in terms of primary effect and entanglement. Even were school officials to purge a TM program of its obvious associations with SCI and use instructors with no "religious" commitment to TM or its underlying theory, such problems would persist since, regardless of how the program is presented, the connection between TM and SCI will inevitably be made. This connection will lead the public to believe that the state, in teaching TM, is in fact promoting a particular religion. There is also the danger that no matter how well insulated TM is from SCI, a TM program will have the effect of inducing religious belief. By creating interest in and giving at least implicit state approval to a practice that has religious implications, the state provides an incentive to the participant to delve more deeply, if privately, into the underlying philosophy—an incentive that presumably grows stronger the more effective the practice is.

The inevitable advancement of SCI that will accompany any program endorsing TM might be tolerable if there were no other means by which the state might pursue its interest in effective relaxation. It appears, however, that such is not the case. Certainly secular meditation techniques achieve at least some of the advantages of TM. Moreover, once TM is purged of its connections with SCI, there

is little that distinguishes it from those secular alternatives.

Even if it does appear that TM, severed from SCI, can offer important benefits unobtainable through less religious means, the question remains whether the state may legitimately seek those benefits. If the incremental benefit provided by the choice of TM over an alternative technique is the result of TM's religious nature, then such a benefit is beyond the power of the state to seek, for the state cannot pursue goals through means that depend on the advancement of religion for their effectiveness. If the incremental benefit is the result of factors that can be duplicated in a secular program, then there is no legitimate reason for preferring TM and running the consequent dangers of promoting religion.

A TM program would be permissible, therefore, only if the state could show (1) that it had effectively divorced TM from SCI, (2) that TM was uniquely effective in producing educational benefits because of factors apart from its connections with SCI, and (3) that these factors were beyond the power of the state reasonably to duplicate. This, it seems clear, is an all but impossible standard to meet, and it is doubtful whether any public school TM program could withstand constitutional analysis despite TM's intrinsic appeal, institutional support, and demonstrably beneficial secular effects.[264]

264. The contention, "why should a good thing like TM be excluded from the public schools?," *see* Baltazar, *TM and the Religion-in-School Issue*, 93 CHRISTIAN CENTURY 708 (1976), is a contention properly directed not at the analysis of this Note but at the establishment clause itself. It could well be argued that schools *should* be allowed to encourage or permit a great variety of voluntary religious activity, particularly when it seems to produce wholesome results. But this is an argument the Supreme Court has apparently rejected. *Cf.* Sherbert v. Verner, 374 U.S. 398, 414 (1963) (Stewart, J., concurring) ("I think that the Court's approach to the Establishment Clause has on occasion, and specifically in *Engel* [and] *Schempp* . . . been not only insensitive, but positively wooden . . . ."). In establishment clause terms, there seems no principled way to distinguish between TM and traditional religious activity. A devotion to neutral principles of law, then, requires that TM be largely excluded from the public schools, despite the benefits it might produce within them.